(13)

No. 03-1488
Title: Ulysses Tory, et al., Petitioners
v.
Johnnie L. Cochran, Jr.
Docketed: April 29, 2004
Lower Ct: Court of Appeal of California, Second Appellate District
Case Nos.: (B159437)
Decision Date: October 29, 2003
Discretionary Court
Decision Date: January 28, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 26 2004	Petition for a writ of certiorari filed. (Response due June 1, 2004)
May 19 2004	Order extending time to file response to petition to and including July 1, 2004.
Jul 1 2004	Brief of respondent Johnnie L. Cochran, Jr. in opposition filed.
Jul 13 2004	Reply of petitioners Ulysses Tory and Ruth Craft filed. (Distributed)
Jul 14 2004	DISTRIBUTED for Conference of September 27, 2004.
Sep 28 2004	Petition GRANTED.
Nov 1 2004	Consent to the filing of amicus briefs in support of either party recieved from counsel for the petitioners
Nov 9 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents.
Nov 12 2004	Joint appendix filed.
Nov 12 2004	Brief of petitioners Ulysses Tory and Ruth Craft filed.
Nov 12 2004	Brief amici curiae of Los Angeles Times Communications LLC, et al. filed.
Nov 12 2004	Brief amicus curiae of Thomas Jefferson Center for Protection of Free Expression filed.
Nov 12 2004	Brief amici curiae of Historians Alfred Brophy, Paul Finkelman, Kermit Hall, Michael Meyerson and Stephen Siegel filed.
Nov 12 2004	Brief amicus curiae of AFL/CIO filed.
Nov 12 2004	Brief amici curiae of Michelangelo Delfino and Mary Day filed.
Dec 17 2004	Brief of respondent Johnnie L. Cochran, Jr. filed.
Jan 19 2005	SET FOR ARGUMENT ON Tuesday, March 22, 2005.
Jan 20 2005	Reply of petitioners Ulysses Tory and Ruth Craft filed.
Feb 4 2005	CIRCULATED.
Mar 1 2005	Record received from Court of Appeals of California. (1 box)
Mar 18 2005	Letter from counsel for the respondent received. (Distributed).
Mar 21 2005	Letter from counsel for the petitioners received. (Distributed).
Mar 22 2005	Argued. For petitioners: Erwin Chemerinsky, Durham, N.C. For respondent: Jonathan B. Cole, Sherman Oaks, Cal.

Supreme Court, U.S.
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Case No. 03-1488

In The

Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.

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OPINIONS BELOW

A copy of the unpublished decision of the Court of Appeal of the State of California is included as Appendix A. The California Court of Appeal's opinion contains the pertinent text of the permanent injunction entered by the Superior Court of the State of California for the County of Los Angeles. (A5-A6)[1] The permanent injunction is included as Appendix B, and the Superior Court's contemporaneous Statement of Decision is included as Appendix C. The Supreme Court of California denied review of the California Court of Appeal's decision, although Justices Kennard and Brown voted to grant review. A copy of the order of the Supreme Court of California is included as Appendix D.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review the October 29, 2003 decision of the Court of Appeal of the State of California, following a denial of discretionary review by the Supreme Court of California on January 28, 2004.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

[1] Citation to the appendices will be styled, "A___".

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. I.

STATEMENT OF THE CASE

The California Court of Appeal affirmed a permanent injunction that forever prohibits *all* future speech – regardless of content or context – about an admitted public figure. (A2, A5-6)

Noted attorney Johnnie L. Cochran, Jr., who concedes his status as a public figure, represented Ulysses Tory in connection with a civil rights action in the early 1980's. For a variety of reasons, Tory became dissatisfied with the quality of services provided by Cochran and his law offices. (A2-A3) As a result, Tory began peacefully picketing on the sidewalk in front of Cochran's law office in Los Angeles and later in front of the Superior Court building in downtown Los Angeles, and demanded the return of money he believes Cochran owes to him. (A 3-5)

Tory and others carried placards bearing various statements. (A3-4) Tory did not personally carry all of the signs, and several of the signs made no mention of Cochran. (*See id.*) The purported statements that mentioned Cochran criticized his handling of Tory's case, and generally questioned Cochran's abilities as an attorney. (*Id.*)

As a result of the picketing activity, Cochran sued Tory and Does for defamation (libel, libel per se, slander and slander per se) and false light invasion of privacy. (A5) The Superior Court for the State of California issued a

preliminary injunction, and subsequently tried the suit without a jury. (*Id.*) Tory represented himself in the proceedings. (*Id.*) Tory consistently asserted his constitutional right to free speech in the trial court proceedings. For example, Tory's Answer to Cochran's operative complaint asserted that "the issuance of a preliminary and/or permanent injunction against his picketing activities as proposed in the Complaint would constitute an unconstitutional prior restraint." (Answer to Amended Complaint at 2.) Moreover, in his objections to the trial court's Statement of Decision, Tory protested that his picketing was "protected under the First Amendment (Freedom of Expression) to the United States Constitution," and further noted that Cochran "is a public figure and therefore, must be held at a higher standard than a private citizen in a matter or issue of libel, slander and invasion of privacy." (Objections to Statement of Decision at 2.)

After finding in Cochran's favor, the Superior Court did not award money damages, but did issue a permanent injunction. (A12-A14) The permanent injunction provides, in pertinent part, as follows:

> Unless and until this Court, after notice to JOHNNIE L. COCHRAN, JR. ("COCHRAN") and opportunity for him to be heard, modifies or vacates this order, it is ordered that TORY, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined from engaging in any of the following: . . .

> In any public forum, including, but not limited to, the Los Angeles Superior Court, and any other place at which COCHRAN appears for the purpose of practicing law: (i) picketing COCHRAN and/or COCHRAN's law firm; (ii) displaying signs, placards or other written or printed material about COCHRAN and/or COCHRAN's law firm; (iii) *orally uttering statements about COCHRAN and/or COCHRAN's law firm* . . . (emphasis added).

Ruth Craft, Tory's putative spouse, was not named as a defendant in the lawsuit, nor was she given a chance to defend herself at trial, but her speech rights were also explicitly restrained in the injunction.

Tory and Craft timely appealed from the permanent injunction. (A6) The appeal focused primarily on whether the permanent injunction is an overbroad prior restraint on future speech issued in violation of the First Amendment and Article 1, Section 2(a) of the California Constitution. (A6-8)[2]

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[2] The appeal raised other issues implicating the First Amendment. First, the appeal asserted that all of the purported statements are protected opinion and/or hyperbole, and therefore none of the statements can give rise to a cause of action for defamation or false light invasion of privacy. (A9-A10) Second, the appeal submitted that Cochran, a public figure, failed to prove, under the constitutionally-mandated clear and convincing evidence standard, that Petitioners published any of the allegedly defamatory statements with actual malice. (A 10) Third, to the extent the permanent injunction is based on placards that are not "of and concerning" Cochran, the appeal insisted that the injunction should, as a matter of constitutional law, be reversed. (Appellants' Opening Brief at 42-43.) Fourth, the appeal argued that Cochran did not present evidence that Petitioners published the vast majority of the alleged statements, and to the extent

(Continued on following page)

The appeal was heard before Division One of the Second Appellate District of the California Court of Appeal. On October 29, 2003, the California Court of Appeal issued an unpublished decision affirming the injunction in full and addressing some, but not all, of the arguments raised by Tory and Craft. (A1-A11) Specifically, the California Court of Appeal rejected the contention that the permanent injunction represented an overbroad prior restraint in violation of the First Amendment and the California Constitution. (A6-A8) The decision states that permanent injunctions on speech are not prior restraints, and that the overbreadth doctrine does not apply to permanent injunctions. (A8)

On December 8, 2003, Tory and Craft timely petitioned the Supreme Court of California for review of the California Court of Appeal's decision. The Petition for Review argued that the permanent injunction is an overbroad prior restraint, inconsistent with the First Amendment, the California Constitution, decisions of this Court and decisions of the Supreme Court of California. (Petition for Review at 8-15) On January 28, 2004, the Supreme Court of California denied review of the California Court of Appeal's decision, with Justices Kennard and Brown voting to grant review. (A30)

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the permanent injunction is based on any unpublished statements it should be reversed. (*Id.* at 40-41.) Tory and Craft do not concede that any statements were published with actual malice; they maintain that many of the purported statements were not published by Tory, that Craft did not publish any of the alleged statements, that several statements are not "of and concerning" Cochran and that all of the purported statements are constitutionally protected opinion and/or hyperbole.

Tory and Craft have faithfully abided by the permanent injunction restricting their speech since the injunction was entered by the Superior Court on April 24, 2002.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE AN IMPORTANT LEGAL ISSUE, WHICH HAS DIVIDED THE CIRCUITS AND STATES, CONCERNING THE CONSTITUTIONALITY OF PRIOR RESTRAINTS ON SPEECH IN DEFAMATION CASES.

A. The Superior Court's Permanent Injunction Imposed A Broad Prior Restraint On All Speech About A Public Figure.

The term "prior restraint" describes orders forbidding communications that are issued before the communications occur. *Alexander v. United States*, 509 U.S. 544, 550 (1993). This Court has explained that "permanent injunctions – *i.e.*, court orders that actually forbid speech activities – are classic examples of prior restraints" because they involve a "true restraint on future speech." *Id.*

The permanent injunction affirmed by the California Court of Appeal is a classic prior restraint because it prohibits future picketing, writing, or any other form of speech in "any public forum." The permanent injunction broadly applies to any speech concerning Johnnie L. Cochran, Jr., who "willingly concedes" his status as a public figure. (A10, A13, A21) Indeed, the injunction says that Tory and Craft cannot "orally utter statements about

Cochran" in any public forum. Under the terms of the injunction, if Tory or Craft speak of Cochran, even in a private conversation in a public park or while walking down a sidewalk, they would be violating the terms of the injunction.

B. This Court Should Grant Review To Resolve A Split Between The Circuits And The States Over The Constitutionality Of Prior Restraints In Defamation Cases, And To Decide The Significant Question Of Whether Prior Restraints Are Permissible In Defamation Cases Brought By Public Figures.

"One of the unwavering precepts of the American law of remedies," is that "equity will not enjoin a libel." Rodney A. Smolla, *Law of Defamation*, § 9.85 (2003). The California Court of Appeal's decision, however, departs from this rule, and stands alongside the opinions of several federal Circuit and state courts of last resort that likewise have approved prior restraints in the defamation context. These decisions are in direct conflict with rulings of many other states and circuits rejecting injunctive relief as a remedy in defamation cases.

Three federal Circuits have approved injunctions on speech to prevent, in advance of future publication, supposedly defamatory or false speech, and another Circuit endorsed the same view in *dictum*. In *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206, 1208-09 (6th Cir. 1990), the Sixth Circuit directed the district court to issue a permanent injunction prohibiting any repetition of statements already found to be false and libelous. The Fifth Circuit came to a similar conclusion, approving an injunction against statements that were the subject of an

underlying defamation lawsuit. *Brown v. Petrolite Corp.*, 965 F.2d 38, 50-51 (5th Cir. 1992). The Ninth Circuit also has approved an injunction against purportedly false speech. *San Antonio Community Hospital v. Southern Calif. Dist. Council of Carpenters*, 125 F.3d 1230, 1237 (9th Cir. 1997).[3] The Third Circuit, ruling in a diversity action, found the reasoning behind state supreme court decisions allowing for such injunctions "quite persuasive," but was bound to conclude that the Supreme Court of Pennsylvania would disagree. *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991).

In addition to the Circuits that have condoned injunctions in defamation cases, at least six state supreme courts also have concluded that restraints on damaging and false speech are constitutionally permissible. *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*, 352 N.W.2d 1, 11 (Minn. 1984); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62-63 (Ga. 1975); *O'Brien v. University Community Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975); *Guion v. Terra Mktg. of Nevada, Inc.*, 523 P.2d 847, 848 (Nev. 1974); *Carter v. Knapp Motor Co.*, 11 So.2d 383, 385 (Ala. 1943); *Menard v. Houle*, 11 N.E.2d 436, 437 (Mass. 1937). Three other state supreme courts have endorsed the same view in *dicta*. *Aguilar v. Avis Rent A Car Systems, Inc.*, 980 P.2d 846, 21 Cal.4th 121, 141 & n.8 (Cal. 1999); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 559 N.W.2d 740, 747 (Neb. 1997); *Downey v. United Weatherproofing, Inc.*, 253 S.W.2d 976, 983 (Mo.

[3] The Superior Court's Statement of Decision relied in part on the Ninth Circuit's decision in *San Antonio*. (A23)

1953).[4] These courts often cite one another, and frequently reference this Court's admonition in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973), that "it has never been held that all injunctions [on speech] are impermissible." *See, e.g., Retail Credit, supra*, 218 S.E.2d at 62-63. *Pittsburgh Press*, however, did not involve allegedly defamatory or false speech, but involved an injunction restraining commercial advertising for illegal hiring impermissibly based on gender.

These decisions approving injunctions in the defamation context contradict opinions from this Court and from other courts around the country. In *Near v. Minnesota*, 283 U.S. 697 (1931), this Court's seminal opinion on prior restraints, a newspaper appealed a permanent injunction issued after a case "came on for trial." *Id.* at 705-06. The unconstitutional injunction in that case "perpetually" prevented the defendants from publishing again because, in the preceding trial, the lower court had determined that the defendants' newspaper was "'chiefly devoted to malicious, scandalous and defamatory articles.'" *Id.* at 706. This Court held that an injunction on future speech, even if preceded by the publication of defamatory material, was an unconstitutional prior restraint. *Id.* at 706, 721.

[4] Intermediate appellate courts in several states also have approved injunctive relief in defamation cases. *See, e.g., Barlow v. Stipes*, 744 N.E.2d 1, 9-10 (Ind. Ct. App. 2001); *Bingham v. Struve*, 184 A.D.2d 85, 89-90 (N.Y. App. Div. 1992); *Dickson v. Dickson*, 529 P.2d 476, 478 (Wash. Ct. App. 1975); *Wolf v. Gold*, 9 A.D.2d 257, 259-60 (N.Y. App. Div. 1959); *Russell v. Russell*, 14 A.2d 540, 543 (N.J. Ch. 1940).

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), a group of picketers and pamphleteers were enjoined from protesting a real estate developer's business practices. *Id.* at 417. Although this Court noted that the injunction in *Keefe* had been labeled "temporary" by the trial court, it was treated as permanent since its label was "little more than a formality," it had been in effect for years, and it "already had [a] marked impact on petitioners' First Amendment rights." *Id.* at 418. This Court struck down the injunction in *Keefe* as "an impermissible restraint on First Amendment rights." The Court explained that the "claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment," as "[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Id.* at 418-19.

Consistent with *Near* and *Keefe*, several federal Circuits have held that equity will not enjoin a libel or slander. *See, e.g., Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 239 F.3d 172, 177-78 (2d Cir. 2001); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir 1987); *In re Providence Journal Co.*, 820 F.2d 1342, 1345-46 (1st Cir. 1986); *United States v. Doe*, 455 F.2d 753, 760 n.4 (1st Cir. 1972); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963); *Robert E. Hicks Corp. v. National Salesmen's Training Ass'n*, 19 F.2d 963, 964 (7th Cir. 1927); *American Malting Co. v. Keitel*, 209 F. 351, 354-56 (2d Cir. 1913).

Likewise, several state courts of last resort recognize and adopt the constitutionally-based rule against

enjoining defamatory speech. *See, e.g., Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983); *Willing v. Mazzocone*, 393 A.2d 1155, 1157-58 (Pa. 1978); *Greenberg v. Burglass*, 229 So.2d 83, 86-89 (La. 1969); *Mescalero Apache Tribe v. Allen*, 469 P.2d 710, 711 (N.M. 1970); *Schmoldt v. Oakley*, 390 P.2d 882, 884-87 (Okla. 1964); *Prucha v. Weiss*, 197 A.2d 253, 256 (Md. 1964); *Kwass v. Kersey*, 81 S.E.2d 237, 243-46 (W.V. 1954); *Moore v. City Dry Cleaners & Laundry, Inc.*, 41 So.2d 865, 873 (Fla. 1949); *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees*, 79 N.E.2d 46, 48-50 (Ill. 1948); *Marlin Fire Arms Co. v. Shields*, 64 N.E. 163, 171 N.Y. 384, 391-96 (N.Y. 1902); *Beck v. Railway Teamsters' Protective Union*, 77 N.W. 13, 24 (Mich. 1898).

Among the many cases affirming the general rule against permanent injunctions, the facts in three decisions are closely analogous to the present situation, but the courts in those cases arrived at a conclusion opposite to that of the California Court of Appeal in this case. The Pennsylvania Supreme Court's decision in *Willing v. Mazzocone* is exactly on point and directly in conflict with the California Court of Appeal's ruling. In *Willing*, two lawyers successfully sued a former client for defamation after the former client protested in front of the building in which the plaintiffs' law firm was located. 393 A.2d at 1156-57. While ringing a cow bell and blowing a whistle to attract attention, the former client wore a "sandwich-board" placard proclaiming that the lawyers had stolen her money and "sold [her] out." *Id.* The trial court issued a permanent injunction on the former client's future "defamatory and libelous" speech regarding the lawyers, and the injunction was affirmed by an intermediate appellate court, following a modification narrowing the

injunction to the specific statements at issue. *Id.* at 1157. Despite the narrowing modification, however, the Supreme Court of Pennsylvania held that the injunction was a prior restraint that violated the free speech guarantees of the United States and Pennsylvania Constitutions. *Id.* at 1157-58.

In *Greenberg v. Burglass,* the Supreme Court of Louisiana determined that a lawyer who had prevailed in a defamation suit after being labeled a "crook," "crooked" and a "slimy kike" was not entitled to a permanent injunction because such an injunction was inconsistent with the free speech provisions of the United States and Louisiana Constitutions. 229 So.2d at 84-87.

In *Kwass v. Kersey,* West Virginia's highest court struck down an injunction prohibiting the defendant, who claimed to be a former client of plaintiff, as well as defendant's "agents, servants, employees and representatives" from "making public or circulating any libelous or slanderous statements of any kind, character or description concerning the plaintiff." 81 S.E.2d at 242-47.

In sharp contrast, the Court of Appeal in this case enjoined not only future defamatory statements, but *all* statements by the defendant and a non-defendant about Johnnie Cochran in any public forum. Contrary to this Court's holdings in cases such as *Near v. Minnesota* and *Alexander v. United States*, the Court of Appeal's expressly ruled that the prior restraint doctrine does not apply to permanent injunctions issued after a trial on the merits. (A6-A7)

This Court should grant review to resolve the split in authority that divides the Circuits and state courts of last resort as to the constitutionality of prior restraints in

defamation cases. The issue takes on an added constitutional dimension since the plaintiff in this case is a public figure. This Court has explained that "public figures are less vulnerable to injury from defamatory statements because of their ability to resort to 'self-help'" – *i.e.*, they "usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979). "[M]ore importantly," this Court has explained that "public figures are less deserving of protection than private persons because public figures, like public officials, have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.'" *Id.*

This Court should review the constitutional propriety of prior restraints in defamation cases, and at least determine whether such remedies are available where the defamation plaintiff is a public figure.

C. This Court Should Grant Review To Decide A Significant Question Concerning When A Court Order Preventing Speech Is Impermissibly Overbroad.

Prior restraints on speech constitute "the most serious and least tolerable infringement on First Amendment rights," and are "presumptively unconstitutional." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975); *Keefe*, *supra*, 402 U.S. at 419. "Injunctions," the Court has explained, "carry greater risks of censorship and discriminatory application than do general ordinances."

Madsen v. Women's Health Center, Inc., 512 U.S. 753, 764 (1994).

Consistent with this Court's abhorrence of prior restraints, it has ruled that any injunction restricting speech must "burden no more speech than necessary to serve a significant government interest." *Madsen*, *supra*, 512 U.S. at 765; *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982); *Pittsburgh Press*, *supra*, 413 U.S. at 390. Put another way, an injunction "issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).

Given these constitutional principles, courts consistently disallow overbroad permanent injunctions on speech. *See, e.g., CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 461-63 (4th Cir. 2000); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 375 (Mo. 2003). For instance, in *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963) the Second Circuit struck down a permanent injunction, issued after a defamation trial, prohibiting "any" report or statement about a businessman or his brother. The court determined that the injunction was an unconstitutional prior restraint, but further observed that the injunction was defective because it precluded "any" remarks, and was not, at a minimum, "directed solely to defamatory reports, comments or statements." *Id.* at 485.

Even in jurisdictions that expressly permit injunctions on defamatory speech, courts caution that any such injunction should be narrowly drawn. For example, in *Lothschuetz*, *supra*, the Sixth Circuit permitted a "narrow"

permanent injunction, limited "to the statements which have been found in this and prior proceedings to be false and libelous." 898 F.2d at 1206, 1209. In *Brown*, *supra*, the Fifth Circuit approved, in principle, of the issuance of an injunction on future false and damaging speech, but ruled that the district court's injunction, as drafted, was "overly broad," and, as a result, remanded the case "to allow the court to narrow its previous language so as to enjoin" the specifically objectionable language. 965 F.2d at 50-51. Similarly, in *Retail Credit*, *supra*, the Supreme Court of Georgia approved a permanent injunction on speech following a defamation trial, but explained that the injunction was limited to "repetition of the exact allegations found to have been libelous." 218 S.E.2d at 62-63.

Without regard to any of the foregoing authority, the California Court of Appeal determined that the permanent injunction is not overbroad even though the injunction prohibits *all* future speech about Cochran, and not just the specific statements previously held to be defamatory or even "defamatory" speech in general. (A7-A8) Indeed, the permanent injunction in this case is so broad that it makes no exception for privileged speech, true speech or any otherwise protected comments about Cochran. The permanent injunction even applies to prevent private conversations that mention Johnnie Cochran in any way. The court's reasoning rested on the unsupported and erroneous proposition that the overbreadth doctrine does not apply to permanent injunctions. (*Id.*) As a matter of law, the California Court of Appeal ruled incorrectly on this issue of profound constitutional importance. Moreover, as a matter of logic, the decision fails because the Court acknowledged that the overbreadth doctrine applies to

preliminary injunctions, statutes and ordinances. (*Id.*) If the overbreadth doctrine applies to interim remedies such as preliminary injunctions then, *a fortiori*, it must also apply to permanent injunctions which are indefinite in nature.

This Court should grant review to resolve the important issue of the constitutional limits and scope of injunctions on speech.

CONCLUSION

The axiom "equity will not enjoin a libel" is no longer an "unwavering precept in the American law of remedies." In the past seven decades since *Near* was decided, a substantial minority of jurisdictions, nationwide, have departed from the general rule and do permit prior restraints in the defamation context. This split in the law threatens a fundamental and cherished right that this Court has described as "'the matrix, the indispensable condition, of nearly every other form of freedom,'" *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967), such that "the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This Court should resolve the current split in authority on this issue of profound constitutional importance, and announce that prior restraints may not be issued in defamation cases, or, at minimum, not in cases involving public figures as plaintiffs.

This Court has approved potential restrictions on speech in areas of substantial and general public interest such as national security, *Near*, 283 U.S. at 716, and

obscenity, *id.*, but this Court has not endorsed such restraints in the defamation context. Defamation of a public figure requires actual malice at the time of publication as well as a false statement of fact. *Herbert v. Lando*, 441 U.S. 153, 199-200 (1979) (Stewart, J., dissenting). Neither mindset nor falsity can be ascertained in advance of a publication because circumstances and understandings can change. Thus, for this reason and others, prior restraints cannot be an appropriate remedy in defamation cases, and particularly not in cases involving public figures who are "less deserving of protection" by virtue of their opportunities for "self-help" and their choice to enter the limelight. *Wolston, supra,* 443 U.S. at 164.

Petitioners, who are forever prevented from mentioning or discussing a prominent public figure, respectfully request that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHNNIE L. COCHRAN, Plaintiff and Respondent, v. ULYSSES TORY et al., Defendants and Appellants.	B159437 (Los Angeles County Super. Ct. No. BC239405) (Filed Oct. 29, 2003)

APPEAL from an order of the Superior Court of Los Angeles County, Ronald M. Sohigian, Judge. Affirmed.

Davis Wright Tremaine, Gary L. Bostwick, Alonzo Wickers IV; Loeb & Loeb, Douglas E. Mirell and Jean-Paul Jassy for Defendants and Appellants.

Nemecek & Cole, Jonathan B. Cole and Karen K. Coffin for Plaintiff and Respondent.

A lawyer sued a former client for defamation and invasion of privacy. The lawyer prevailed, and the trial court (based on a finding that damages were inadequate under the circumstances) issued a permanent injunction. We reject the former client's challenges to the injunction and affirm.

FACTS

A.

In 1983, Ulysses Tory and Javier Gutierrez (who had been involved in a "shoot out" with the Los Angeles Police Department) retained Johnnie L. Cochran, Jr. to represent them in a personal injury action against the City of Los Angeles and others. Cochran filed the action and settled Gutierrez's claim, but not Tory's, and Tory became unhappy with the manner in which Cochran was representing him.

In July 1985, Tory wrote to Cochran, complaining that Cochran was conspiring with the City "to cover up criminal and immoral activities to private citizens for political gains. . . ." Tory said he would "settle" his conspiracy claims against Cochran and "refrain from any public discussions of conspiracy or scandal" if Cochran quickly paid him $10 million "or very close to it." Cochran, in turn, filed a motion to withdraw as Tory's lawyer, and the motion was granted in November. No fees were due (it was a contingency case) and none were paid.

B.

In July 1995 (after ten years of silence and at which time Cochran was receiving a great deal of publicity as one of the defense lawyers in O.J. Simpson's criminal trial), Tory again wrote to Cochran, demanded that Cochran return money that Tory had paid to Earl E. Evans, a lawyer who Tory said had "allegedly represented [Tory and his putative spouse, Ruth Craft] in matters of Divorce, Child Custody, Order to Show Cause and Union Bank!!!" Cochran did not respond.[1]

C.

In the late 1990's, Tory and a troop of people began picketing outside Cochran's office and outside the Los Angeles Superior Court, carrying placards with these statements:

> "Johnnie is a crook, a liar and a Thief. Can a lawyer go to HEAVEN? Luke 11:46"
>
> "Hey Johnnie, How Much Did They Pay $$ You to F--- Me?"
>
> "You've been a BAD BAD boy, Johnnie L. Cochran"

---

[1] Although Tory's letter referred to Evans as one of Cochran's "associates," there was no such relationship. During the 1980's, Evans was Cochran's tenant and paid for the space by providing limited legal services for Cochran. One such task was the "intake interview" when Tory first consulted Cochran in 1985, but Evans did not perform any other services for Cochran with regard to Tory's personal injury case (and that was the only case in which Cochran ever represented Tory). Evans, meanwhile had been directly retained by Tory and Craft to handle some family law matters.

"Att[orne]y COCHRAN, We have no Use for Illegal Abuse"

"I Know How it Feels to be Terrorized. God Bless USA"

"Absolute Discrimination"

"Attorney Cochran, Don't We Deserve at Least the same Justice As O.J.?"

"Unless You have O.J.'s Millions – You'll be Screwed if You USE J.L. Cochran, Esq."

"Johnnie L. Cochran, Esq., Your Piss is Not Rain"

"Attn: Attorney Johnnie L. Cochran, Jr., Flaunting and Flossing. It's the People He's Costing"

"Attorney Johnnie, It's Past Time!!!"

"Johnnie Cochran I Know WHAT You, the County and city DID to my CASE"

"DON'T LAUGH, COCHRAN SCREWED YOU GUYS TOO!"

What can I do if I don't receive the Justice the Constitution guarantees ME?

Of all the picketers, only Tory and possibly one other person had been Cochran's clients. Tory transported the picketers to Cochran's office and to the courthouse, bought lunch for all of them, and admitted the "possibility" that some of the picketers joined him only because they wanted a free lunch. In October 2000, while the picketing continued, Tory wrote to Cochran, demanded the return of $6,500 allegedly paid to Evans, and also demanded another $15,000 from Cochran to "compensate"

him for his "time and efforts to bring this entire matter to closure. . . ."

D.

Cochran filed this lawsuit against Tory in October 2000, alleging causes of action for defamation and invasion of privacy.[2] Tory answered, and represented himself throughout the trial court proceedings. A preliminary injunction was issued, discovery was conducted, and the case was tried to the court in March 2002. In its statement of decision, the trial court found that Cochran was entitled to a permanent injunction against Tory because Tory's statements were false and were made with knowledge of their falsity, "maliciously and with reckless disregard for the truth [and] for the purpose of inducing Cochran to pay Tory various amounts of money to which Tory was not entitled." The court enjoined Tory as follows:

> "[I]t is ordered that Tory, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined from engaging in any of the following:
>
> "1. Standing, assembling or approaching within [300 yards] of (i) Cochran; or (ii) Cochran's place of business . . . ;

---

[2] The trial court found that, after "the commencement of this litigation, [Tory's conduct] worsened as the band of picketers supplemented the placards with additional banners and loud chanting of obscene statements."

"2. In any public forum, including, but not limited to, the Los Angeles Superior Court and any other place at which Cochran appears for the purpose of practicing law: (i) picketing Cochran [or] Cochran's law firm; (ii) displaying signs, placards or other written or printed material about Cochran [or] Cochran's law firm; (iii) orally uttering statements about Cochran [or] Cochran's law firm; and

"3. Contacting, harassing, threatening, stalking, disturbing the peace of, keeping under surveillance or blocking the movements of Cochran."

Tory (now represented by counsel and purportedly joined by Ruth Craft, who is restrained by the injunction in her capacity as Tory's agent) appeals.

DISCUSSION

I.

Tory contends "the second numbered paragraph" of the permanent injunction is a "particularly egregious" prior restraint and, as such, unconstitutional under both the federal and state constitutions. We disagree.

Although a prior restraint can be presumptively unconstitutional, that rule has no application where, as here, an injunction against a private person operates "to redress alleged private wrongs," not to suppress a legitimate publication. (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 418-419.) The injunction in this case was issued based on the trial court's findings – after a full trial on the merits – that Tory's statements were both libelous and slanderous within the meaning of Civil Code

sections 45 and 46, and that pecuniary compensation would not afford an adequate remedy. As a result, the second numbered paragraph "was issued only after the [trial court] determined that [Tory] had engaged in [unlawful activity], and the order simply preclude[s Tory] from continuing [his] unlawful activity." (Cf. *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 138.)

As our Supreme Court explained in *Aguilar,* the special vice of a prior restraint is that it suppresses communication before there has been an adequate determination that the speech is unprotected under the First Amendment. Once there has been a final adjudication on the merits that the speech is unprotected, an injunction restraining that speech does not constitute an impermissible prior restraint. (*Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th at p. 141.) In *Aguilar,* the Court held that "the pervasive use of racial epithets that has been judicially determined to violate the FEHA is not protected by the First Amendment, and such unlawful conduct properly may be enjoined." (*Id.* at pp. 141-142.) By parity of reason, the same is true here, where the pervasive use of libelous and slanderous statements have been judicially determined to violate Civil Code sections 45 and 46.[3]

II.

Alternatively, Tory contends the second numbered paragraph is "unconstitutionally overbroad." This is so, he

[3] The same is true under the California Constitution. (*Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th at pp. 142-145.)

claims, because it means he cannot "[p]raise [Cochran] as the finest lawyer of Los Angeles," "[i]nform people that [Cochran] represented O.J. Simpson," "[w]rite a 'letter to the editor' criticizing the court's ruling below," "[r]epublish or read aloud the Court of Appeal's decision in *Cochran v. Cochran* [(1998)] 65 Cal.App.4th 488 . . . , where parties alleged that Cochran made a death threat against them," "[a]ppear in court to challenge the [i]njunction," or "[t]ell friends, at a picnic in a public park: 'Johnnie Cochran was not very nice to me.'" We disagree.

The cases cited by Tory all construe language in preliminary injunctions (*Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d 1528) or statutes, ordinances, and the like (*NAACP v. Alabama* (1964) 377 U.S. 288; *In re Berry* (1968) 68 Cal.2d 137; *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470; *Gooding v. Wilson* (1972) 405 U.S. 518; *Houston v. Hill* (1987) 482 U.S. 451; *Schad v. Mount Ephraim* (1981) 452 U.S. 61; *Airport Comm'rs v. Jews for Jesus, Inc.* (1987) 482 U.S. 569; *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497), not permanent injunctions issued after a full trial on the merits and findings that the speech at issue is not protected. For the reasons explained in Part I, *ante,* Tory's cases have nothing to do with the permanent injunction issued in this case.

Based upon his prior unlawful conduct and his admissions in court that, absent restraint by the court, he would continue to picket Cochran, Tory has no basis for his challenge to the breadth of the injunction.[4]

---

[4] When asked whether he intended to keep picketing Cochran until Cochran paid him, Tory said, "It's a possibility." The court followed-up

(Continued on following page)

III.

Tory contends the judgment is not supported by substantial evidence because (according to Tory) the evidence establishes only that he stated his opinion, not that he made "provably false" statements of fact. We disagree.

Substantial evidence shows that Tory "crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact." (*San Antonio Hosp. v. So. Cal. Council of Carpenters* (9th Cir. 1997) 125 F.3d 1230, 1237.) Tory's statements – such as, "Hey, Johnnie, how much did they pay $$ you to f--- me?" and "Johnnie Cochran, I know what you, the County and City did to my case," and "Johnnie is a crook, a liar and a thief," accuse Cochran of theft and of accepting money as a bribe to abandon Tory's case against the City and the County and, as such, constitute libel within the meaning of Civil Code section 45 – because a false statement reasonably calculated to induce the reader to understand that a person is guilty of a crime or is dishonest in his profession is sufficient to establish libel. (*Gallagher v. Chavalas* (1941) 48 Cal.App.2d 52, 59; *Goehring v. Wright* (N.D.Cal. 1994) 858 F.Supp. 989, 1004; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 471, p. 558; §§ 482-484, pp.

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by asking Tory, "Do you desire to do more picketing of Mr. Cochran or with respect to your grievance against Mr. Cochran at any time at any place? . . . I just mean as things are today, no changes of position on anybody's part except, are you going to want to do more picketing . . . of Mr. Cochran with respect to these grievances at any place, at any time?" Tory answered, "I'm quite sure, Your Honor, I will protest against Mr. Cochran. . . . Yes. . . . Unless you order us not to."

566-572.) No more was required. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-873.)[5]

IV.

In a related argument, Tory contends the evidence is insufficient to establish that he acted with actual malice. Again, we disagree.

Assuming without deciding that Tory is entitled to the same protections afforded to a legitimate newspaper defending a libel action, and assuming that Cochran is (as he willingly concedes) a public figure, and thus assuming that this is a case in which we must review the evidence de novo to determine whether it supports the trial court's finding of actual malice (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 514; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842), we are satisfied that Tory acted with actual malice. Uncontroverted evidence establishes that Cochran did not owe any money to Tory, that Tory knew his statements were all false, and that he nevertheless set out to harass Cochran by hiring picketers to carry outrageous placards and repeatedly march in front of Cochran's office building and in front of the Los Angeles Superior Court. Under any standard, this is more than enough to show actual malice.

---

[5] We summarily reject Tory's suggestion that the "context" of his statements shows they were mere opinion. In context, Tory was demanding money that wasn't owed to him, which to us supports the trial court's finding that Tory intended to go to any length to slander Cochran, and that he knowingly made false statements of fact.

DISPOSITION

The permanent injunction is affirmed. Cochran is entitled to his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL (MIRIAM A.), J.

We concur:

ORTEGA, Acting P.J.

MALLANO, J.

APPENDIX B

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHNNIE L. COCHRAN, JR., Plaintiff, vs. ULYSSES TORY; and DOES 1 through 50, inclusive, Defendants	Case No. BC239405 The Honorable Ronald Sohigian **PERMANENT INJUNCTION** DATE: April 24, 2002 TIME: 8:30 a.m. DEPT: "41" TRIAL DATE: March 18, 2002 (Filed Apr. 24, 2002)

WHEREAS, the above-entitled cause came on regularly for trial on March 19, 2002, March 20, 2002 and March 21, 2002, in Department 41 of the above-entitled court, the Honorable Ronald Sohigian, Judge, presiding without jury, and was tried on that date;

WHEREAS, oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision;

The Court, having considered the evidence and heard the arguments of counsel and being fully advised, hereby issues the following permanent injunction against ULYSSES TORY ("TORY");

Unless until this Court, after notice to JOHNNIE L. COCHRAN, JR. ("COCHRAN") and opportunity for him to be heard, modifies or vacates this order, it is ordered that TORY, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined from engaging in any of the following:

1. Standing, assembling or approaching within three hundred (300) yards of (i) COCHRAN; or (ii) COCHRAN's place of business located at 4929 Wilshire Blvd., Los Angeles, CA 90010;

2. In any public forum, including, but not limited to, the Los Angeles Superior Court and any other place at which COCHRAN appears for the purpose of practicing law: (i) picketing COCHRAN and/or COCHRAN's law firm; (ii) displaying signs, placards or other written or printed material about COCHRAN and/or COCHRAN's law firm; (iii) orally uttering statements about COCHRAN and/or COCHRAN's law firm; and,

3. Contacting, harassing, threatening, stalking, disturbing the peace of, keeping under surveillance or blocking the movements of COCHRAN.

IT IS SO ORDERED.

DATED: April 24, 2002.

RONALD M. SOHIGIAN
RONALD M. SOHIGIAN
JUDGE OF THE LOS ANGELES
SUPERIOR COURT

APPENDIX C

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHNNIE L. COCHRAN, JR. Plaintiff, vs. ULYSSES TORY; and DOES 1 through 50, inclusive. Defendants.	) Case No. BC239405)) The Honorable Ronald Sohigian)) (Filed Apr. 24, 2002))) STATEMENT OF DECISION PURSUANT TO *RULE OF COURT* SECTION 232 AND *CODE OF CIVIL PROCEDURE* SECTION 632)) DATE: April 24, 2002) TIME: 8:30 a.m.) DEPT: 41

The above-entitled cause came on regularly for trial of the equitable issue of plaintiff's request for injunctive relief, on March 19, 2002, March 20, 2002 and March 21, 2002, in Department 41 of the above-entitled court, the Honorable Ronald Sohigian, Judge, presiding without

jury. Jonathan B. Cole, Esq. of Nemecek & Cole appeared as counsel for plaintiff JOHNNIE L. COCHRAN, JR. ("COCHRAN"), and ULYSSES TORY ("TORY") appeared in pro per. The Court, having ordered this matter bifurcated on February 20, 2002, proceeded to hear and adjudicate the factual and legal questions necessary to determine whether COCHRAN was entitled to the permanent injunctive relief he sought to preclude TORY from picketing and making false and defamatory written and oral comments about COCHRAN in connection therewith.

Oral and documentary evidence material to said factual and legal questions was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The Court, having considered the evidence and heard the arguments of counsel and being fully advised, found that the facts and the law supported the issuance of a permanent injunction against TORY, and granted COCHRAN the injunctive relief he sought, as set forth in the separately filed Permanent Injunction.

In so doing, the Court (as discussed at the February 20, 2002 status conference) "evaluate[d] the lawfulness of [TORY'S] picketing conduct" and, in connection therewith, was necessarily "required to make a determination as to the 'truthfulness' of the statements at issue" which did "in effect lead to findings with respect to COCHRAN's defamation and invasion of privacy causes of action" [Notice of Ruling re February 20, 2002 Status Conference]. As such, subsumed in the findings of fact and conclusions of law made by the Court for the purpose of determining the propriety of injunctive relief, are findings that, with the exception of the existence

and amount of damages, all of the elements of the tort theories advanced by COCHRAN (libel, libel per se, slander, slander per se, and invasion of privacy (false light)) were established concurrently with COCHRAN's establishing his right to equitable relief. The issues so subsumed in the equitable issue which has been tried by this Court need not (indeed may not) be retried (*Golden West Baseball Company v. City of Anaheim* (1994) 25 Cal.App.4th 11, 50; see also *Walton v. Walton* (1995) 31 Cal.App.4th 277; *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671; *Union Oil of California v. Reconstruction Oil Company et al.* (1943) 58 Cal.App.2d 30).

Based thereon, this Court hereby issues the following statement of decision:

1. This Court finds that COCHRAN is entitled to permanent injunctive relief as set forth in the separately filed Permanent Injunction because pecuniary compensation will not afford COCHRAN adequate relief and the restraint is necessary to prevent a multiplicity of judicial proceedings.

   a. This Court bases its decision on the following facts which it finds, based on admissible evidence offered and admitted at trial:

      (1) TORY retained COCHRAN on a contingency basis in early 1983 in the matter of *TORY, et al. v. City of Los Angeles, et al.*, Case No. C473 832;

      (2) On or about July 18, 1985, TORY, with the assistance of his putative wife, Ruth Craft ("Craft"), wrote COCHRAN a threatening letter accusing COCHRAN of conspiring against

him and demanding $10 million dollars:

(3) The July 18, 1985 letter in effect demanded that COCHRAN make payments of money to TORY, apparently as a return of legal fees that TORY and/or Craft paid to Earl Evans, Esq. ("Evans");

(4) Evans was a space-for-services tenant in COCHRAN's law suite at 4929 Wilshire Boulevard and was not a partner of COCHRAN;

(5) TORY and Craft knew and recognized that Evans and COCHRAN were not partners as evidenced by, among other things, the fact that all the checks for legal services rendered for TORY and/or Craft are made payable to Evans, not to COCHRAN;

(6) The contents of the July 18, 1985 letter are inaccurate and constitute obviously unreasonable demands;

(7) COCHRAN owes no money whatsoever to TORY;

(8) TORY never paid COCHRAN any money at all for legal services or any other purpose;

(9) COCHRAN responded to TORY's July 18, 1985 letter by letter dated July 30, 1985 and subsequently sought and obtained an order relieving him as counsel for TORY in the matter of *TORY, et al. v. City of Los Angeles, et al.*;

(10) COCHRAN was justified in seeking to be relieved as counsel for TORY because it was essentially impossible for COCHRAN to continue to represent TORY under the circumstances following the letter of July 18, 1985;

(11) TORY and Craft complained to the State Bar about COCHRAN and Evans, but the State Bar took no action except to tell them that their asserted grievances as to Evans and COCHRAN were fee disputes rather than disputes regarding disciplinable matters;

(12) TORY and Craft did not go forward with fee-related litigation or arbitration against COCHRAN or Evans;

(13) It is not true, as TORY alleged, that Evans' representation in various family law matters for Craft was deficient or that Craft prevailed in a federal court action regarding her child custody matters;

(14) What actually happened in connection with Craft's family law dispute according to Craft's own testimony is that she lost in the state court and lost in the federal courts after that, but that her former husband voluntarily turned the children over to her, which is no reflection at all on the quality of legal representation rendered by Evans;

(15) Beginning before January 2000 but also in and after January 2000 TORY and various agents of TORY have regularly picketed COCHRAN's office in Los Angeles at 4929 Wilshire Boulevard, and

the Los Angeles Superior Court with placards;

(16) The placards used by TORY contain slogans such as (1) "Johnnie is a crook, a liar and a thief. Can a lawyer go to heaven? Luke 11:46"; (2) "Hey Johnnie How Much Did They Pay$$You to F_ _k Me?"; (3) "You've been a BAD, BAD boy, Johnnie Cochran"; (4) "Attorney COCHRAN We have no Use for Illegal Abuse"; (5) I Know How it Feels to be Terrorized; (6) Absolute Discrimination; (7) "Attorney Cochran, Don't We Deserve at Least the Same Justice as O.J.?"; (8) Unless You Have O.J.'s Millions You'll be Screwed if You Use J.L. Cochran, Esq."; (9) Johnnie L. Cochran, Esq., Your Piss is Not Rain; (10) "Attn: Attorney Johnnie L. Cochran, Jr., Flaunting and Flossing It's the People He's Costing"; (11) Attorney Johnnie, It's Past Time; (12) Johnnie Cochran I Know What You, the County and the city did [sic] my case"; and, (13) "Don't Laugh, Cochran Screwed You Guys Too." These slogans and the statements made therein are untruthful, misleading and malicious.

(17) After the commencement of this litigation, the conduct of TORY and his agents worsened as the band of picketers supplemented the placards with additional banners and loud chanting of obscene statements.

(18) The statements made by TORY and his agents also included statements to the

effect that COCHRAN owed a substantial amount of money to TORY; that COCHRAN owed debts to TORY based on breaches of past oral and written agreement that COCHRAN acted dishonestly or below the standard of care in prior legal representation of TORY; and that Cochran is a bad character and/or a substandard practitioner of law. These statements, too, are untruthful, misleading and malicious.

(19) COCHRAN is a public figure.

(20) All of the aforementioned statements made were false when they were made; were made maliciously and with reckless disregard for the truth; and were actually made for the purpose of inducing COCHRAN to pay TORY various amounts of money to which TORY was not entitled;

(21) All the people who were involved in the picketing, including but not necessarily limited to Craft, were the agents of TORY acting within the course and scope of their agency during the times that they were picketing, preparing signs, and speaking at the premises at 4929 Wilshire Boulevard, Los Angeles, and in front of the Los Angeles Superior Court courthouse.

(22) TORY and his agents, including but not necessarily limited to Craft, were aware of the falsity of the statements when they were made;

(23) The picketing conduct of TORY and his agents was intentionally targeted at

preventing person(s) from entering COCHRAN's place of business for legal services and creating a negatively charged and ominous environment.

(24) Despite repeated requests, TORY has refused to cease his picketing efforts unless he was paid a monetary "settlement" by COCHRAN.

(25) TORY and his agents and [sic] made false statements in the picketing, both expressly and impliedly, and orally and in writing.

(26) TORY has indicated that unless prevented by a judgment or some other process of this court he will continue to picket, and the Court finds that he would.

(27) This is not a matter of speech related issues: it is simply the use of false and defamatory and privacy-invading communications to coerce or attempt to improperly coerce payment of money in tribute for or premium for desisting from that type of activity.

(28) TORY has claimed to have no means by which a monetary award could be satisfactorily paid.

(29) COCHRAN has no remedy which is plain, speedy, and adequate except for injunctive relief.

(30) In the absence of injunctive relief, COCHRAN will be irreparably harmed by the conduct of TORY about which COCHRAN complains herein.

(31) TORY's behavior is not protectable and his conduct is enjoinable.

(32) The order for injunctive relief the court is making now is absolutely necessary in order to prevent a multiplicity of actions.

b. The legal basis for this Court's decision that COCHRAN is entitled to injunctive relief is:

(1) "[A] final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant; Where pecuniary compensation would not afford adequate relief; Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; 3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings . . . "(*Civil Code* Section 3422; see also *Remillard-Dandini v. Dandini* (1941) 46 Cal.App.2d 678, 680);

(2) Picketing and use of banners and/or signs containing false and misleading allegations and orally uttering false and misleading statements support the grant of an injunction (*San Antonio Community Hospital v. Southern California District Council of Carpenters*, (1997) 125 F.3d 1230, 1237 citing *Mercy Health Services v. 1199 Health & Human Services Employees Union* (W.D. Mich. 1995) 888 F. Supp. 828, 838.)

(3) Reputation is "difficult to restore once it has been tainted" and hence injury to reputation is "irreparable" within the

meaning or the requirements for injunctive relief (*Id.* at 1238).

(4) TORY's malicious picketing is likely to damage COCHRAN's professional reputation is for an improper purpose and, as such, is enjoinable.

2. This court finds that TORY and his agents engaged in libelous activity.

(a) This Court bases its decision on the facts found, based on admissible evidence offered and admitted at trial identified at paragraphs 1.a.(1) through (25), above.

(b) The legal basis for this Court's decision that TORY and his agents engaged in libelous activity is:

(1) California *Civil Code* section 45 defines "libel" as:

"a (i) false and (ii) unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, (iii) which exposes any person to hatred, contempt, ridicule, or obloquy, or (iv) which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

(2) The written statements made by TORY and his agents in connection with the picketing described above are false and unprivileged and had a tendency to injure COCHRAN in his occupation as an attorney.

(3) No recognized privilege pursuant to California *Code of Civil Procedure* section 47, or any other provision of law,

applies to TORY's picketing actions, nor can TORY support an affirmative defense of truth.

3. This Court finds that TORY and his agents engaged in libel per se.

a. This Court bases its decision on the facts found, based on admissible evidence offered and admitted at trial, identified at paragraphs 1.a.(1) through (25), above.

b. The legal basis for this Court's decision that TORY and his agents engaged in libel per se is:

(1) California *Civil Code* section 45a defines "libel *per se*" or "libel on its face" as; "a libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact."

(2) The definition of "libel per se" is "very broad [and] include[s] almost any language which, upon its face, ha[s] a natural tendency to injure a person's reputation, either generally, or with respect to his occupation (*Bates v. Campbell* (1931) 213 Cal. 438).

(3) In construing language charged as libelous it is necessary to consider the publication as a whole (*Stevens v. Snow* (1923) 191 Cal. 58).

(4) The court in determining whether or not there is a libel *per se* "must place itself in the position of a reader under the circumstances of the publication." (*Rosenberg v. J.C. Penney Co.* (1939) 30

Cal.App.2d 609, 619; *Bettner v. Holt* (1886) 70 Cal. 270).

(5) Here, as in *Rosenberg, supra*, "the language and meaning of the placards are so plain that it was not necessary to resort to the innuendo and while some of the language may have been free from any libel, it is sufficient to support an action where the gist of the language contains the objectionable charge or insinuation, and here the charges upon the placards lead to the conclusion that plaintiff s were accused of dishonesty in dealing with their customers, thereby injuring the business and its good reputation." (*Id.* at 622.)

4. This Court finds that TORY and his agents engaged in acts which are both slanderous and slanderous per se.

a. This Court bases its decision on the facts found, based on admissible evidence offered and admitted at trial, identified at paragraphs 1.a.(1) through (25), above.

b. The legal basis for this Court's decision that TORY and his agents engaged in slander and slander per se is:

(1) California *Civil Code* section 46 defines "slander," in pertinent part as: "a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: (1) Charges any person with crime, or with having been indicted, convicted, or punished for crime; . . . (3) Tends directly to injure

him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; . . . or (5) Which, by natural consequence, causes actual damage."

(2) "Words which fall within the purview of *Civil Code* Section 46 are deemed to constitute slander per se (*Douglas v. Janis* (1974) 46 Cal.App.3d 931; *Contento v. Mitchell* (1972) 28 Cal.App.3d 356) with the effect that the utterance of such words is actionable without proof of special damage (*Correin v. Santos* (1961) 191 Cal.App.2d 844)" (*Albertini v. Shaefer* (1979) 97 Cal.App.3d 822, 829).

(3) "A fair construction of *Civil Code* section 46 requires a holding that calling an attorney a 'crook' is . . . actionable as slander per se . . . imputing dishonesty or lack of ethics to an attorney is also actionable under *Civil Code* section 46 because of the probability of damage to professional reputation (*Katz v. Rosen* (1975) 48 Cal.App.3d 1032)" (*Id.* at 829-830).

(4) TORY made false and unprivileged publications orally and through loudspeakers which tended to directly injure COCHRAN in respect to his profession, trade or business by imputing to him

general disqualification in those respects which the occupation of attorney at law peculiarly requires and by imputing things which have a natural tendency to lessen his profits.

5. This Court finds that TORY violated COCHRAN's privacy by creating publicity which placed him in a false light in the public's eye.

a. This Court bases its decision on the facts found, based on admissible evidence offered and admitted at trial, identified at paragraphs 1.a.(1) through (25), above.

b. The legal basis for this Court's decision that TORY and his agents engaged in "false light" invasion of privacy is:

(1) Courts recognize as tortious "invasion of privacy," publicity which places the plaintiff in a false light in the public eye, (*Kinsey v. Maeur* (1980) 107 Cal.App.3d 265, 270; see Prosser, *Law of Torts* (4th ed., 1971) s 117, pp. 804-814.)

(2) The interest protected by the false light invasion of privacy tort is individual freedom from the wrongful publicizing of private affairs and activities which are outside the realm of legitimate public concern. (See *Coverstone v. Davies* (1952) 38 Cal.2d 315, 323; *Stryker v. Republic Pictures Corp.* (1951) 108 Cal.App.2d 191, 194).

(3) "[T]he scope of an actionable invasion of privacy includes not only true but derogatory statements about an individual, but also statements that falsely

attribute offensive behavior to him." (*Selleck v. Globe* (1985) 166 Cal.App.3d 1123, 1135 citing *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 239 P.2d 630.)

(4) "Inasmuch as plaintiff's claim for false light invasion of privacy is based on the facts alleged in his claim for libel, he likewise is not required to plead special damages in order to state a cause of action for false light [invasion of privacy]." (*Selleck v. Globe* (1985) 166 Cal.App.3d 1123).

(5) TORY's publicized statements are not only false and defamatory in nature but falsely attribute offensive behavior to COCHRAN and have violated his right of privacy concerning his peace of mind to be free from such false publications.

DATED: APR. 24, 2002

RONALD M. SOHIGIAN
RONALD SOHEGIAN
JUDGE OF THE
LOS ANGELES
SUPERIOR COURT

APPENDIX D

Court of Appeal, Second Appellate District,
Division One – No. B159437
S121121

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOHNNIE L. COCHRAN, Plaintiff and Respondent,

v.

ULYSSES TORY et al., Defendants and Appellants.

(Filed Jan. 28, 2004)

Petition for review DENIED.

George C.J., was absent and did not participate.

Kennard, J. and Brown, J., are of the opinion the petition should be granted.

/s/ WERDEGAR
Acting Chief Justice

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(2)

Supreme Court, U.S.
FILED
JUL - 1 2004
OFFICE OF THE CLERK

No. 03-1488

In The
Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a permanent injunction, directed to parties who have engaged in defamatory and extortionist picketing, violates the First Amendment by imposing a broad "place" restriction on future speech related activities.

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INTRODUCTION

For the sake of brevity, Respondents will not mince words. Petitioners ULYSSES TORY and RUTH CRAFT ("Petitioners" or "TORY") are wrong on the facts, wrong on the law, and wrong as to the paramount public policies. In contrast, the California Court of Appeal, Second Appellate District, has it exactly right. The Court of Appeal meticulously and correctly applied the existing law to the facts which the trial court, after a **full trial on the merits**, determined to be undisputed.

TORY's petition for writ of certiorari fails to demonstrate why this Court should entertain his cause. The underlying appellate court opinion is unpublished and has no precedential value, creating no need for this Court to secure uniformity of decision. In addition, the Court of Appeal properly applied the law to the adjudicated facts.

Petitioners assert that review is appropriate to resolve what they contend is a conflict among various courts regarding the propriety of injunctions in defamation cases. However, just as they did in the Court of Appeal, Appellants ignore one crucial fact in their Petition. TORY's speech was enjoined (and the injunction affirmed) ***not*** because of its content, ***but because of its purpose***. As recognized by both the Trial Court and the Court of Appeal, TORY engaged in protests and made defamatory statements about COCHRAN for the express purpose of coercing payment of money by COCHRAN to TORY in tribute for or premium for desisting from unlawful picketing. In other words, TORY was abusing his free speech right by making knowingly false statements for personal financial gain. TORY was not simply parading around COCHRAN's places of business for the purpose of

expressing his honest opinion about COCHRAN; rather, TORY practically admitted (and the trial court found) that he was picketing and protesting for the purpose of extorting money from COCHRAN. This is not a case simply about a successful defamation plaintiff; it is a case about a victim of multiple extortion attempts. Under these circumstances, the order that issued enjoining TORY from further extortion efforts (the "Injunction") was entirely appropriate and constitutional.

STATEMENT OF THE CASE

While generally accurate, Petitioners' "Statement of the Case" is factually erroneous in certain important respects, especially when coupled with the somewhat misleading language of Petitioners' articulation of the "Question Presented" by the Petition for Writ of Certiorari (the "Petition").[1]

First, contrary to the picture painted by Petitioners, this is not a case about restraining peaceful picketers; it is a case about extortion. The trial court (as the finder of fact) determined that Petitioners abused their speech rights by making "false" statements "maliciously and with reckless disregard for the truth ... for the purpose of inducing COCHRAN to pay TORY various amounts of money to which TORY was not entitled." (A21)[2]

[1] See Respondent's description of the "Question Presented" at p. i, above.

[2] Citations styled "A___" refer to the appendices to the Petition.

Second, Petitioners were doing much more than just expressing their opinions. In the course of their picketing activity, Petitioners made statements that (in the words of the trial judge) were "to the effect that COCHRAN owed a substantial amount of money to TORY ... that COCHRAN acted dishonestly or below the standard of care in prior legal representation of TORY; and that Cochran is a bad character and/or a substandard practitioner of law. These statements ... are untruthful, misleading and malicious." (A20-A21) While Petitioners may also have made non-actionable statements of opinion, it is misleading to suggest that this is a case about **only** speech that legitimately "criticized" or "questioned" COCHRAN. (P2)[3]

Third, the Injunction is not an order that "forever prohibits *all* future speech." (P2) The Injunction enjoins Petitioners from picketing and from making "statements about COCHRAN and/or COCHRAN's law firm" only in a "public forum" – i.e., "a place that is open to the public where information is freely exchanged." (*Damon v. Ocean Hills Journalism Club* (2000), 85 Cal.App.4th 468, 475).[4] (P2-P3) Settled case law uniformly holds that appropriate "time, manner and place" restrictions may constitutionally be imposed on speech. (*See, e.g., Hill v. Colorado*, 530 U.S.

[3] Citations to the Petition for Writ of Certiorari will be styled, "P___".

[4] Although it has been noted that a "public forum" includes places "historically associated with First Amendment activities, such as streets, sidewalks, and parks" (*Zhao v. Wong*, 48 Cal.App.4th 1114 (1996)), Petitioners' contention that a private conversation in a park or on a sidewalk would violate the Injunction, is absurd. In a "private conversation" one does not "freely exchange" information with members of the public. Accordingly, statements made privately, by definition cannot constitute speech in a "public forum".

703, 736 (2000); *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 535 (1980).) Under the facts of this case, the restriction at issue is necessary. The California Court of Appeal correctly upheld the Injunction, and there is no basis for certiorari to be granted with regard thereto.

REASONS FOR DENYING THE PETITION

CERTIORARI SHOULD BE DENIED BECAUSE FEDERAL AND STATE COURTS UNIFORMLY HOLD THAT TORTIOUS PICKETING AND RELATED SPEECH SUCH AS THAT HERE AT ISSUE MAY BE ENJOINED WITHOUT CREATING AN UNCONSTITUTIONAL "PRIOR RESTRAINT"

A petition for writ of certiorari will be granted only for compelling reasons, including resolution of conflicts between decisions of this Court and one or more lower courts of last resort. (*Rules of the Supreme Court of the United States,* Rule 10.) "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (*Id.*) The case law governing the present dispute is neither inconsistent nor unsettled. Rather, upon close inspection, Petitioner simply asserts that the California trial court and court of appeal misapplied the law. Review by this Court is neither appropriate nor warranted.

A. There Is No "Split" Between Circuits And/Or States For This Court To "Resolve"

In an effort to interest this Court in a mundane libel lawsuit, TORY argues that: (i) the California Court of Appeal "affirmed" the lower court's "prior restraint" order; and, (ii) in so doing, the California court joined other state and federal courts that have failed to abide by the general constitutional prohibition on prior restraint.

TORY's analysis is flawed, however. There are not two schools of thought on this issue. A uniform body of law safeguards First Amendment rights while, at the same time, protecting third parties from undue injury resulting from another's freedom of expression. Specifically, it is now firmly established that a party's freedom of expression may not be judicially abridged, unless and until it has been judicially determined – usually by a full trial on the merits – that the speech activity at issue is unlawful and unprotected.

This is the rule that was applied by the California Court of Appeal in this case, and it is the rule that has been consistently and uniformly applied to reach appropriate decisions in virtually every case cited by TORY in his Petition.[5] Accordingly, neither the lower court's decision in this matter, nor the cases cited by TORY in his Petition, evidence a "split between the circuits and the states on the constitutionality of prior restraint." There is

[5] While TORY may have cited one or more cases that were wrongly decided, or decided without adequate explanation of the court's rationale, an occasional erroneous or inadequate decision does not create a "split" in judicial thinking sufficient to justify certiorari by this Court.

no such "split" for this Court to resolve, and there is no reason to grant certiorari in this case.

1. Existing Case Law Is Consistent With The Principles Of Law Espoused By This Court In *Pittsburgh Press*

The theme of TORY's Petition is that the law is not being applied consistently because in some cases speech is enjoined, and in some cases it is not. He argues that the question of "constitutionality of prior restraints in defamation cases" is undecided. (P12) However, as evidenced by the very cases TORY cites, this is not true.

As TORY admits, there is a body of law that derives from this Court's "admonition" in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 375 (1973) that not all injunctions on speech are impermissible. Although *Pittsburgh Press* was not a defamation case, the constitutional question addressed was whether a judicial prohibition against a publication was an unconstitutional "prior restraint." A hearing was had, whereat evidence was "received" and argument was "heard ... from the parties and from other interested organizations" (*Id.* at 379). As a result, this Court was not "asked to speculate as to the effect of publication" but instead was in a position to make a "final determination that the actions of Pittsburgh Press were unprotected" **before** publication was prohibited (*Id.*). In this respect, the facts of *Pittsburgh Press* were distinguishable from those cases where injunctive relief was found to be unconstitutional.

The analysis set forth in TORY's Petition is defective because TORY fails to heed the lesson of *Pittsburgh Press*.

Rather than acknowledge the distinction between expression that has already been found to be unlawful and/or unduly intrusive on the rights of another party, TORY starts with the premise that whenever a court enjoins speech related activity, it has endorsed "prior restraint." While this may have once been an arguable position, it is no more. As explained in *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*, 352 N.W.2d 1, 11 (Minn. 1984), cases such as *New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) "may once have stood for the proposition that any injunction against speech activity was a 'prior restraint' on speech." However, "[m]ore recently . . . the Supreme Court has stated that '[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.'" (*Advanced Training Systems, supra*, citing *Pittsburgh Press*.)

Based on this principle, the *Advanced Training Systems* court held that it is not unconstitutional to forbid a party to engage in speech that has **already been found** by a judge or jury to be unprotected. This exact same rationale was used in *Retail Credit Company v. Russell*, 234 Ga. 765, 779 (1975). There the court relied on *Pittsburgh Press* to find that an injunction directed at statements that a jury had already been found to be false and defamatory was not a "prior restraint." An injunction in *Guion v. Terra Mktg. of Nevada, Inc.*, 523 P.2d 847, 848 (Nev. 1974) similarly withstood constitutional scrutiny because it forbade defendant from making statements that were false and malicious and tended to discourage prospective customers from doing business with the plaintiff.

These orders were proper because "[e]quity will . . . restrain tortious acts where it is essential to preserve a business or property interest and also restrain the publication of false and defamatory words where it is the means or an incident of such tortious conduct." (*Id.*)

The court that decided *O'Brien v. University Community Tenants Union, Inc.*, 327 N.E.2d 753 (Ohio 1975), likewise acknowledged that:

> "[S]ome narrow classes of speech are unprotected by the First Amendment .... Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper. The judicial determination that specific speech is defamatory must be made prior to any restraint."

(*Id.* at 755, citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).)

The *O'Brien* court held that if the plaintiff could prove that the statements at issue were false and defamatory, and that they were being made for the improper purpose of "blacklisting" plaintiff by attempting to "coerce the public into refusing to rent" from the plaintiff, then "a claim for proper injunctive relief might be granted." (*O'Brien* at 755.) The same conclusion was reached in the pre-*Pittsburgh Press* cases of *Carter v. Knapp Motor Co.*, 11 So. 2d 383 (Ala. 1943) and *Menard v. Houle*, 11 N.E.2d 436 (Mass. 1937) – both cases in which it was recognized

that a plaintiff's interest in his business and livelihood could outweigh a defendant's right to free expression.[6]

In *Lothschuetz v. Carpenter*, 898 F.2d 1200 (9th Cir. 1990), an injunction did not issue at the trial court level precisely **because** that court "characterized the injunction requested as an unwarranted prior restraint on freedom of speech." On appeal, two of the three justices reviewing the case took "a contrary view," and an injunction was therefore permitted to issue. Although the reported decision is devoid of any meaningful explanation of the basis for this "contrary view," there is no indication that the justices who voted to issue the injunction were rejecting established law, or condoning the wholesale use of prior restraint to prevent defamation. Instead, those judges – like the judges in the instant case – simply caused an order to issue that was designed to protect the plaintiffs from further damage to "business relations" and "personal reputation," while impacting the defendants' speech as little as possible.

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[6] The *Carter* court commented: "[T]he right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected, if necessary, by injunctive process. [Citation.] And the enjoyment of the good name and good will of a business is likewise a valuable property right subject to like protection. [Citation.] One's employment, trade or calling is likewise a property right, and the wrongful interference therewith is an actionable wrong." (*Carter, supra*, 11 So. 2d at 384.) Similarly, in *Menard* it was noted: "Equity will take jurisdiction where there is a continuing course of unjustified and wrongful attack upon the plaintiff motivated by actual malice, and causing damage to property rights as distinguished from 'injury to the personality affecting feelings, sensibility and honor.'" (*Menard, supra*, 11 N.E.2d at 437.)

2. *Pittsburgh Press* And The Cases That Follow It Are Consistent With Other Cases Decided By This And Other Courts

TORY argues that the foregoing decisions "contradict" this Court's opinions in *Near v. Minnesota*, 683 U.S. 697 (1931) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) as well as state and federal cases following the holdings of *Near* and *Keefe*. The court in *Retail Credit*, *supra*, addressed this very argument, however, and rejected it, distinguishing *Near*, *New York Times* and *Keefe* on the ground that the orders in those cases did not restrain expression that had already been determined to be unprotected, as was the case in *Retail Credit* (and as is the case here). In fact, in not one of those cases had a jury or other factfinder examined the words and conduct at issue in order to definitively determine whether or not it was tortious. Accordingly, pursuant to the rule of *Pittsburgh Press* – to wit, that "judicial determination that specific speech is defamatory must be made prior to any restraint" – the orders at issue were premature and potentially unwarranted. It was therefore appropriate and entirely consistent with the holding of *Pittsburgh Press* and its progeny (as well as those state and federal cases that pre-date *Pittsburgh Press* but come to the same conclusion) for this Court to reverse the lower courts in *Near, New York Times,* and *Keefe.*

Further, the numerous cases cited by TORY as support for his proposition that some courts refuse to enjoin defamatory speech, do nothing to establish the existence of the "split" TORY contends exists. In fact, the federal cases TORY cites further support COCHRAN in that they are all consistent with the rule that injunctions affecting speech generally should **not** issue before a fact-finder determines

that the speech related conduct is also tortious. None of those cases is inconsistent, however, with the cases on which COCHRAN relies for the proposition that **after** speech related activity has been found to be tortious, an injunction may issue.

TORY has located only a handful of state court opinions rendered during the last 106 years wherein an injunction issued without a full trial on the merits was upheld. Even if every one of those few cases was inconsistent with the general rule set forth herein, they would hardly constitute a significant "split" of authority and in fact could probably be written off as aberrations. Moreover, not all of these cases are contrary to COCHRAN's position herein. For example, in both *Schmoldt v. Oakley*, 390 P.2d 882 (Okla. 1964) and *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees*, 79 N.E.2d 46 (Ill. 1948), the courts recognized that there is an exception to the general rule against enjoining libel, where "coercion" is involved. The fact finders in those cases, however, found that no coercion existed. In the case at bar, however, coercion was found at the trial court level, and may not be challenged here.

B. The Particular Injunction Here At Issue Comports With The Rules Created By The Case Law

After a full trial on the merits, the factfinder in this case determined that TORY abused his speech rights by attempting to extort money from COCHRAN, and by defaming COCHRAN in the process. (A15-A29) By TORY's own admission, if he is not enjoined from doing so, TORY will renew his extortionist activity until such time as COCHRAN pays TORY an undetermined amount of

money to stop it. (A8-A9) The Injunction, then, is a remedy which serves to prevent TORY from attempting to extort a payment from COCHRAN by publishing false statements – not merely a precaution to prevent further libel and slander.

Contrary to the description given by TORY, the Injunction does not "prohibit *all* future speech about COCHRAN." (P15) As explained in COCHRAN's "Statement of the Case," above, the injunction is not unlimited. It is designed to prevent TORY from resuming his obstructionist, harassing interference with COCHRAN's business. As the Court of Appeal recognized, TORY's conduct is much more than simple defamation. He has engaged in a pattern and practice of disrupting COCHRAN's ability to practice his profession for the purpose of obtaining money from COCHRAN. (A6-A8) Enjoining only specific statements or only defamatory speech will not remedy the wrong that TORY has committed and has vowed to continue committing unless prohibited from doing so by court order. (A8-A9)

Although the injunction here at issue is broad, in light of the unusual facts of this case, and the egregious nature of TORY's conduct, COCHRAN submits that it is not constitutionally overbroad.

CONCLUSION

Neither the Court of Appeal, nor the other courts referenced in TORY's Petition, have created a "split" among jurisdictions with regard to application of long-standing First Amendment principles. Application of those principles to the facts of this case can only result in the

conclusion that TORY's speech – which, by its wrongful nature, was not subject to constitutional protection – was properly enjoined. This Court should therefore deny the petition for a writ of certiorari.

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July 2004

(3)

Supreme Court, U.S.
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No. 03-1488

In The Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

REPLY TO BRIEF IN OPPOSITION

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I. THE OPPOSITION REINFORCES THE NEED FOR CERTIORARI BY DEMONSTRATING A SIGNIFICANT SPLIT IN AUTHORITY AS TO WHETHER A COURT MAY PERMANENTLY ENJOIN SPEECH AS A REMEDY IN A DEFAMATION CASE

The Opposition does not, and cannot, deny that there is a significant split in decisions among the Circuits and the States as to whether a court may impose a broad injunction of speech as a remedy in a defamation case. Nothing in the Opposition refutes that many, and likely most, courts across the country would disagree with the California Court of Appeal's decision upholding a permanent injunction preventing Petitioner Tory from saying *anything* about Respondent Johnnie Cochran in any public forum at any time. Indeed, the Opposition's central contention, that an injunction of speech following a trial is not a prior restraint, only highlights the need for this Court to grant the Petition for Writ of Certiorari and clarify this important issue.

A. The Opposition Actually Reaffirms That There Is A Split Among The Circuits And State Supreme Courts As To Whether A Court Can Issue An Injunction In A Defamation Action

Although the Opposition asserts that there is no split in authority, its analysis of pertinent case law actually reinforces the existence of a split between jurisdictions that allow injunctions in defamation cases and those that

do not. (O5-11)[1] The Opposition does not dispute that there is a general rule, adhered to in most jurisdictions, holding that "equity will not enjoin a libel." Rodney A. Smolla, *Law of Defamation*, § 9.85 (2003). The Opposition also makes no meaningful effort to distinguish or address the many decisions cited in the Petition that disapprove injunctions on speech, even after a judicial determination has been made that the speech is defamatory. (P10-12)

Instead, the Opposition attempts to dismiss some of the cases that contradict the general rule barring such injunctions by explaining that they were "wrongly decided, or decided without adequate explanation of the court's rationale[.]" (O5 n.5) But this, of course, acknowledges that there is a significant split in authority among courts across the country. The fact that Respondent Cochran disagrees with the decisions that contradict the conclusion of the California Court of Appeal in his favor does not refute the unquestionable existence of a significant split in authority. (P7-13)

B. The Opposition Demonstrates How The Misapplication Of *Pittsburgh Press* Is Fomenting The Split

In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), this Court approved a narrow injunction restraining gender discriminatory commercial advertisements. Although the decision in *Pittsburgh Press* generally acknowledged that "it has

[1] Citations to the Petition for Writ of Certiorari will be styled, "P___", citations to Respondent's Brief in Opposition will be styled, "O___", and citations to the appendices will be styled, "A___".

never been held that all injunctions [on speech] are impermissible," that opinion did not involve or evaluate any defamation claims, nor did it approve of injunctions on supposedly defamatory speech. *Id.* at 390.[2] In fact, the first part of the sentence from *Pittsburgh Press* relied upon by Respondent expressly invokes and *distinguishes* the decision in *Near v. Minnesota*, 283 U.S. 697 (1931), where this Court held that an injunction on future speech, even if preceded by the publication of defamatory material, was an unconstitutional prior restraint. *Near*, 283 U.S. at 706, 721. The Opposition explains that several opinions have seized on the general language in *Pittsburgh Press* in order to justify injunctions in defamation cases. (O6-11)[3]

The Petition acknowledges that narrow injunctions on speech may be permissible in certain contexts (*e.g.*, national security, obscenity or advertising illegal activity). (P9, P16-17) However, as *Pittsburgh Press* suggests, and many courts across this nation have recognized, defamation is a different breed. (*See* P9-12) Defamation has elements that may change over time (*e.g.*, scienter and falsity), making efforts to enjoin supposedly defamatory speech particularly difficult and pernicious. (*See* P16-17) Indeed, reading *Pittsburgh Press* to allow injunctions in

[2] *See generally Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 573-74 (1995) (acknowledging that because *Pittsburgh Press* was a case about commercial advertising, not defamation, it permitted more government control under the First Amendment).

[3] *See, e.g., Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206, 1209 (6th Cir. 1990); *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991); *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*, 352 N.W.2d 1, 11 (Minn. 1984); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62-63 (Ga. 1975).

defamation cases, as several lower courts have done, conflicts with this Court's decisions in *Near* and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (hereinafter "*Keefe*"). Contrary to the Opposition's contentions, the injunctions in *Near* and *Keefe* were permanent, they were issued after adversarial proceedings, they were meant to stop supposedly harmful future speech and they were deemed by this Court to be unconstitutional prior restraints. *Near*, 283 U.S. at 705-06; *Keefe*, 402 U.S. at 417-19. The Opposition's assertion that a permanent injunction is not a prior restraint directly conflicts with this Court's statement in *Alexander v. United States*, 509 U.S. 544, 550 (1993), describing the permanent injunctions in *Near* and *Keefe* as "classic examples of prior restraints." The decisions interpreting *Pittsburgh Press* to allow injunctions in defamation cases misapply *Pittsburgh Press*, and exacerbate the constitutional split that plagues this issue. Review by this Court is essential to clarify the law in this area and resolve a significant split among courts across the country.

C. Respondent's Public Figure Status Heightens The Need To Resolve The Split As It Impacts This Case

The constitutional dilemma posed by the split is amplified by an undisputed fact that the Opposition refuses to acknowledge: Respondent is an admitted public figure. (A10, A21) As the Petition explains, public figures like Respondent Johnnie Cochran enjoy less protection under the law of defamation. (P13) In this case, therefore, it is even more important to resolve whether a court may forever enjoin discussion of a public figure.

D. The Opposition's Contention That The Injunction Does Not Need To Be Limited To The Words Found To Be Defamatory Reinforces The Need To Decide When A Court Order Preventing Speech Is Impermissibly Overbroad

The Opposition relies on cases that allow injunctions in the defamation context, but those opinions also carefully explain that any such injunction must be limited to the statements already found to be defamatory. (P14-15)[4] Despite this limiting language, the Opposition admits that the injunction is "broad," and further contends that, in this case, "[e]njoining only specific statements or only defamatory speech will not" be a sufficient remedy. (O12) The Opposition's contention, however, stands contrary to abundant constitutional authority – including the cases relied on throughout the Opposition – demonstrating that the injunction here is, on its face, unconstitutionally overbroad. The injunction upheld by the California Court of Appeal prohibits *all* future speech about Cochran, and is not limited to specific statements previously held to be defamatory or even "defamatory" speech in general. (P13-16) The Opposition's recognition that the injunction is broad, coupled with the constitutional mandate that any injunction "in the area of First Amendment rights must be couched in narrowest terms," *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968),

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[4] *See, e.g., Lothschuetz, supra*, 898 F.2d at 1209 (injunction limited to "the statements which have been found in this and prior proceedings to be false and libelous"); *Advanced Training Systems, supra*, 352 N.W.2d at 11 (injunction "limited to the precise statements found libelous"); *Retail Credit, supra*, 218 S.E.2d at 62-63 (injunction limited to "repetition of the exact allegations found to have been libelous").

reinforces the need for this Court to decide the permissible scope of injunctions in the defamation context, *even assuming* this Court resolves the split to allow such injunctions.

II. THE OPPOSITION'S EFFORTS TO RECAST THIS CASE DO NOT DIMINISH THE NEED FOR CERTIORARI

A. The Overbroad Injunction Is Not Limited To A Particular "Place"

For the first time in any briefing in this case, Cochran suggests that the injunction is valid because it is merely a restriction on the "place" of Petitioners' speech. (O3, O12) The injunction broadly prohibits all discussion of Cochran in "any public forum." (A13) Public forums include "places," such as streets, parks and sidewalks,[5] but they also encompass much more than mere physical locations. Indeed, the Opposition relies on *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 475-76 (2000), which determined that a community board meeting and a community newsletter were each a public forum. Thus, the injunction's reach to "any public forum" speaks directly to its unconstitutional overbreadth by preventing speech about Cochran in public places, public meetings, news outlets, and all other forums open for public discussion. Under the terms of the injunction, Tory could not walk down a public sidewalk and talk to a friend about Johnnie Cochran.

[5] O3 (acknowledging that streets, sidewalks and parks are public forums); *see also Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (parks and streets are public forums).

B. The Purportedly Extortionate Purpose Of Petitioners' Prior Speech Has No Bearing On The Petition

The Petition does not rely on any disputed factual findings, and does not ask the Court to review or resolve any conflicts in the facts. Instead, the Petition presents a question for review that challenges the face of a permanent injunction limiting future speech, relying only on the undisputed fact that Cochran, an admitted public figure plaintiff, obtained a permanent injunction following a bench trial on his defamation and related false light claims. (A2-6, A10, A21)[6]

Petitioners take issue with the Opposition's repeated accusations of extortion. (O1-2, O11-13)[7] But Cochran's

[6] In California, defamation claims and false light claims based on the same facts are "in substance equivalent." *Kapellas v. Kofman*, 1 Cal.3d 20, 35 n.16 (1969).

[7] Cochran never filed a criminal complaint for extortion, nor did he bring a civil suit on that theory. Neither Petitioner was ever charged, tried or convicted of extortion. The trial court did not make a finding of "extortion." Even if Cochran's baseless claims of extortion could be charitably construed as a mere rhetorical device, they still are not warranted. Courts consistently hold that the right to free speech is not diminished simply because the subject of the speech feels itself being pressured, coerced or even extorted. *See Keefe, supra,* 402 U.S. at 418-19 (the claim that expressions are "intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment," as "[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) ("'coercive'" speech is "protected by the First Amendment"); *Willing v. Mazzocone*, 393 A.2d 1155, 1156-58 (Pa. 1978) (striking down permanent injunction on woman's false and defamatory speech about her former lawyers even though woman was trying to exact money from her lawyers that she was not owed); *Gilbert v. National Enquirer, Inc.*, 43 Cal.App.4th 1135, 1142-44 (1996) (rejecting injunctive relief even

(Continued on following page)

characterization of the nature or purpose of Petitioners' alleged prior speech does not diminish the need for certiorari. Indeed, regardless of the purported content or purpose of any past or future speech, the face of the injunction still raises an important constitutional question.

CONCLUSION

The question presented in the Petition allows this Court to address a critical constitutional dilemma on multiple levels. First, this case presents the Court with an opportunity to resolve the split between the jurisdictions that allow injunctions on speech in the defamation context and those that do not. Second, this case presents this Court the opportunity to clarify whether a permanent injunction of speech should be regarded as a prior restraint. Third, if the Court determines that injunctive relief may be available in defamation cases, it can still deny such relief to public figures, who typically enjoy less protection because by virtue of their opportunities for "self-help" and their choice to enter the limelight. Finally, even if the Court approves of injunctions to stop future defamation, it can restrict the scope of such orders to

though plaintiff claimed that defendant was using defamatory speech to "extort" money from her).

prevent overbroad injunctions that limit all future speech on a given topic.

Respectfully submitted,

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Case No. 03-1488

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In The Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

JOINT APPENDIX

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Los Angeles Superior Court
Case Number BC239[illegible]

* * *

10/09/2001 First Amended Complaint
Filed by Attorney for Plaintiff/Petitioner

* * *

10/19/2001 Answer to Amended Complaint (DEFTS' ANSWER TO PLFF'S AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT/TEMPORARY INJUNCTIONS RESTRAINING ORDER; [PROPOSED] VERIFIED FIRST AMENDED COMPLAINT FOR DAMAGES)
Filed by Defendant & Defendant in Pro Per

* * *

04/11/2002 Objection Document (DEFT TORY'S OBJECTION TO PERMANENT INJUNCTION)
Filed by Defendant & Defendant in Pro Per

04/11/2002 Objection Document (DEFT TIRY's [sic] OBJECTIONS TO STATEMENT OF DECISION PURSUANT TO RULE OF COURT SECTION 232 AND CODE OF CIVIL PROCEDURE SECTION 632)
Filed by Defendant & Defendant in Pro Per

* * *

04/24/2002 Order (PERMANENT INJUNCTION)
Filed by Attorney for Plaintiff/Petitioner

04/24/2002 Statement of Decision (PURSUANT TO RULE OF COURT SECTION 232 AND CODE OF CIVIL PROCEDURE SECTION 632)
Filed by Attorney for Plaintiff/Petitioner

06/12/2002 Notice of Appeal
Filed by Appellant

* * *

06/24/2002 Notice of Appeal
Filed by Appellant

* * *

Proceedings Held

03/19/2002 at 08:30 am in department 41, Ronald M. Sohigian, Presiding Jury Trial (5 DAY ESTIMATE) – **Full Day of Trial Held**

03/20/2002 at 08:30 am in department 41, Ronald M. Sohigian, Presiding Court Trial – Long Cause – **Half Day of Trial Held**

03/21/2002 at 09:30 am in department 41, Ronald M. Sohigian, Presiding Court Trial – Long Cause – **End of Trial**

* * *

04/24/2002 at 08:30 am in department 41, Ronald M. Sohigian, Presiding Other . . . (HEARING RE PROPRIETY OF STATEMENT OF DECISION AND OTHER MATERIALS) – **Completed**

CALIFORNIA APPELLATE COURTS
Second Appellate District
B159437

Date	Description	Notes
06/19/2002	Notice of appeal lodged/received.	n/a 6/12/02 Ulysses Tory
	* * *	
07/03/2002	Notice of appeal lodged/received.	n/a 6/24/02 Ruth Craft
	* * *	
01/09/2003	Petition for writ of supersedeas filed.	/request to stay restraint on free speech.
01/16/2003	Order filed.	Denying Petition for Writ of Supersedeas filed 01/09/03.
01/24/2003	Record on appeal filed.	C-1, R-1
	* * *	
02/24/2003	Appellant's opening brief.	Attorney: Jassy, Jean-Paul Party: Tory, Ulysses Attorney: Jassy, Jean-Paul Party: Craft, Ruth Attorney: Jassy, Jean-Paul Party: Tory, Ulysses

* * *

03/24/2003	Motion/application to augment record filed.	of resp re attached r-1
	* * *	
04/11/2003	Augmentation granted. (See order.)	filed 3/24/03 by resp Cochran; rt (dtd 4/24/02) attached to motion
	* * *	
06/20/2003	Respondent's brief.	Attorney: Cole, Jonathan Party: Cochran, Johnnie
	* * *	
07/10/2003	Appellant's reply brief.	Attorney: Jassy, Jean-Paul Party: Tory, Ulysses
	* * *	
10/28/2003	Cause argued and submitted.	
10/29/2003	Opinion filed.	
11/05/2003	Rehearing petition filed.	by appellants
11/06/2003	Petition for rehearing denied.	
12/09/2003	Petition for review in Supreme Court received	
12/15/2003	Record transmitted to Supreme Court.	1x6"
01/28/2004	Petition for review denied in Supreme Court.	

02/05/2004	Record returned from Supreme Court.	1x6"
02/18/2004	Remittitur issued.	
02/18/2004	Case complete.	
	* * *	
08/19/2004	Filed request to publish opinion.	by Balboa Island Village Inn
09/07/2004	Letter sent to:	Supreme Crt stating if Court still had jurisdiction they would now grant request to publish the opinion. The Court is forwarding the request to the Supreme Court with recommendation to grant (see letter)

CALIFORNIA APPELLATE COURTS
Supreme Court
S121121

Date	Description	Notes
12/08/2003	Petition for review filed	counsel for appellant Ulysses Tory, et al.
12/12/2003	Record requested	
12/30/2003	Answer to petition for review filed	by counsel for resp. (J. Cochran, Jr.) (40k)
01/09/2004	Reply to answer to petition filed	by counsel for aplt. (Ulysses Tory, et al.,)
01/28/2004	Petition for review denied	George, C.J., was absent and did not participate. Kennard, J. and Brown, J., are of the opinion the petition should be granted.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHNNIE L. COCHRAN, JR. Plaintiff, vs. ULYSSES TORY; and DOES 1 through 50, inclusive, Defendants.	CASE NO. BC239405 **[PROPOSED] VERIFIED FIRST AMENDED COMPLAINT FOR DAMAGES FOR:** 1) Libel; 2) Libel per se; 3) Slander; 4) Slander per se; 5) Invasion of Privacy (False Light Publicity) 6) Temporary Restraining Order, Preliminary and Permanent Injunctions

INTRODUCTORY ALLEGATIONS

(Filed Oct. 9, 2001)

1. At all relevant times herein, Plaintiff JOHNNIE L. COCHRAN, JR. ("COCHRAN" or "Plaintiff") was and is a resident of Los Angeles County, State of California, and

an attorney at law, duly licensed to practice law before all courts of the State of California.

2. Plaintiff is informed and believes and on that basis alleges that at all times mentioned herein, Defendant ULYSSES TORY ("TORY or "Defendant") is a resident of the County of Los Angeles, in the State of California.

3. Plaintiff is unaware of the true names and capacities of those defendants sued herein as DOES 1 through 50, inclusive, and therefore sues these defendants using fictitious names. Plaintiff will amend this complaint to allege the DOES true names and capacities when that information becomes known. Plaintiff is informed and believes and on that basis alleges that each of these fictitiously named defendants are legally responsible in some manner for the actions and inactions alleged herein and that the injuries suffered by plaintiff as alleged throughout this complaint were proximately caused by these actions and inactions. Plaintiff further alleges, based upon information and belief, that each defendant sued herein was acting as the agent or employee of each of the other defendants, and in doing the acts alleged herein was acting within the course and scope of such agency and/or employment, and/or aided, abetted, cooperated with, and/or conspired with one another to do the acts alleged herein.

4. At all relevant times mentioned herein defendant DOES 1 through 50, inclusive, were residents of Los Angeles County.

STATEMENT OF FACTS

5. This complaint concerns a pattern of ongoing acts of defamatory harassment committed by defendant TORY, and DOES 1-50, commencing on or around January 1, 2000 and continuing to the present day. Beginning on or around January 1, 2000, defendants, and each of them, made written statements on or around the premises of COCHRAN's law office building located at 4929 Wilshire Boulevard, in the City of Los Angeles, which included, but were not limited to, false statements that (i) COCHRAN owed a substantial sum of money to TORY, based upon alleged breaches of oral and written agreements with TORY; (ii) that COCHRAN owed financial debts to TORY based upon alleged past breaches of said oral and written agreements; (iii) that COCHRAN acted in a dishonest manner during prior legal representations of TORY; and, (iv) that COCHRAN is unfit to practice law, due to the aforementioned alleged acts of moral turpitude. Said statements were plainly visible to all individuals who were in or around the premises at 4929 Wilshire Boulevard, when defendants were present.

6. TORY, DOES 1-50, and TORY's agents, employees, and/or servants, orally broadcast statements and chanting similar to those set forth in paragraph 5, through the use of blow-horns and over loudspeakers to passers by, which were plainly heard to all individuals who were in or around the premises of 4929 Wilshire Boulevard, when defendants were present.

7. All of the published statements as set forth by defendants in paragraphs 5 and 6, either named plaintiff directly and/or were made of and concerning plaintiff and

was so understood by those who read and/or hear the publications.

8. ***All of the published statements as set forth by defendants in paragraphs 5 and 6 were, and continue to be, false. Defendants, and each of them, knew such statements were false, yet nevertheless knowingly stated and published such statements to third parties with actual knowledge of their falsity and continue to do so to this day.***

9. Despite TORY's publicized claims, the ***true*** facts and circumstances concerning COCHRAN and TORY's prior relationship are set forth as follows:

(a) TORY retained COCHRAN on a contingency basis in early 1983 in the matter of *Tory, et al. v. City of Los Angeles, et al.* (C 473 832).

(b) On or about July 18, 1985, TORY inexplicably wrote COCHRAN a threatening demand letter for $10 million dollars accusing COCHRAN of conspiring against him.

(c) COCHRAN responded to Tory by letter dated July 30, 1985 and subsequently sought to be relieved of counsel in the matter of *Tory, et al. v. City of Los Angeles, et al.*

(d) ***TORY never paid COCHRAN any monies whatsoever, for legal services or otherwise.***

(e) A decade or so after the fact, by letter dated July 6, 1995, TORY demanded COCHRAN return legal fees paid to a third party, Earl E. Evans, Esq., for dissatisfactory legal services apparently rendered by Mr. Evans. Notably, COCHRAN and Mr. Evans, as former associates,

have not had a formal affiliation since the late 1970s. Further, all such purported claims for repayment of legal fees paid in the mid-80's are not only without factual or legal legitimacy but now, time barred as a matter of law.

(f) COCHRAN has never received any payment from TORY in the form of legal fees or for anything else and thus, ***does not owe TORY any monies whatsoever.***

(g) TORY has been sporadically picketing COCHRAN outside of his place of business located at 4929 Wilshire Blvd., Los Angeles, CA 90010 on an on-again and off-again basis with placards since the late 1990s until the present. Most recently, the weekly picketing resumed on or about January 1, 2000 and has continued regularly to date.

(h) Placards used by TORY are untruthful and misleading in nature. For example, one placard exemplifies libel per se by directly attacking COCHRAN's character and integrity, i.e., "Johnnie is a crook, a liar and a thief. Can a lawyer go to heaven? Luke 11:46." Another placard misleadingly implies that TORY received poor legal representation from the COCHRAN. "Hey Johnnie How Much Did They Pay$$You to F__k Me?." **Both types of claims are without any factual and/or evidentiary substantiation whatsoever.**

(i) Despite purportedly egregious misconduct by COCHRAN against TORY, no formal disciplinary action has resulted from TORY's complaints nor has he successfully pursued any formal legal remedies related thereto, choosing instead to take the law into his own hands for his own brand of "justice."

(j) ***TORY has received at least, three (3) previous monetary settlements for confidential sums after picketing outside Union Bank of California, Sanwa Bank and Shell Oil Company in the 1990s.***

(k) TORY is in the business of professionally extorting monies from innocent persons and business entities through his unlawfully picketing of falsehoods – COCHRAN is merely his latest target.

(l) Despite repeated requests, TORY has refused to cease his picketing efforts without a similar monetary "settlement" payment from COCHRAN and has promised to picket for "however long it takes" until his demands for a pay-off are met.

(m) TORY is the organizer and leader of the band of picketers.

(n) TORY's conduct has been worsening recently as the band of picketers has begun to supplement the placards with loud chanting of obscene statements, i.e., "Johnnie, pay me my mother-f__king money!;" "Johnnie, you are a cheat!;" and "If you come down here, I'll kick your ass!" Said conduct in its entirety is intentionally targeted at preventing person(s) from entering COCHRAN's place of business for legal services and creating a negatively charged and ominous environment.

(o) As feared, TORY's conduct has only continued to worsen presently as COCHRAN continues to refuse paying TORY to stop.

(p) COCHRAN has knowledge and belief that persons have been intimidated by TORY's conduct and have failed to seek legal counsel as a direct result thereof; thus, causing COCHRAN unknown loss of business and

irreparable harm to his law practice as well as to his professional and personal reputation.

(q) To date, TORY's conduct has worsened as he continues to unlawfully picket COCHRAN's place of business, located at 4929 Wilshire Boulevard through the (i) use of false statements depicted on placards; and, (ii) broadcasting of false statements to passers by through blow horns and loudspeakers.

FIRST CAUSE OF ACTION

(Plaintiff JOHNNIE L. COCHRAN, JR., Against All Defendants for Libel)

10. Plaintiff incorporates and realleges all previous allegations contained in this Complaint as though fully set forth herein.

11. As a result of the published statements as set forth by defendants in paragraphs 5 and 9, defendants, and each of them, have published false and unprivileged statements made by writing which have exposed plaintiff to hatred, contempt, ridicule, obloquy, and have injured him in his occupation because in short, by falsely claiming that plaintiff is a liar and a thief, expressly and impliedly unfit for the practice of law.

12. As a proximate result of the maliciously false and defamatory written publication of statements to third parties as set forth by defendants in paragraphs 5 and 9, plaintiff has suffered loss to his reputation, shame, mortification, and hurt feelings all to his general damage to be determined according to proof.

13. As a further proximate result of the above-described publications, plaintiff has suffered special damages, including but not limited to injury to plaintiff's business, profession, and occupation, all to his injury in the sum according to proof but no less than $250,000.00.

14. The above-described publication was published by defendants, and each of them, with actual malice, oppression and fraud in that they were aware at the time of the falsity of their publication and thus, made said publications in bad faith out of hatred and ill-will misdirect towards plaintiff, without any regard for truth. As a result plaintiff seeks an award of exemplary damages against all defendants for libel.

SECOND CAUSE OF ACTION

**(Plaintiff JOHNNIE L. COCHRAN, Jr.
Against All Defendants for Libel Per Se)**

15. Plaintiff incorporates and realleges all previous allegations contained in this Complaint as though fully set forth herein.

16. As a result of the publication of false and unprivileged statements as set forth by defendants in paragraphs 5 and 9, which are without the necessity of explanatory matter, defendants, and each of them, have published statements which are libelous on their face and thus, constitute libel per se.

17. As a proximate result of the maliciously false and defamatory publication of statements to third parties as set forth by defendants in paragraphs 5 and 9, plaintiff has suffered loss to his reputation, shame, mortification,

and hurt feelings all to his general damage to be determined according to proof.

18. The above-described publication was published by defendants, and each of them, with actual malice, oppression and fraud in that they were aware at the time of the falsity of their publication and thus, made said publications in bad faith out of hatred and ill-will misdirect towards plaintiff, without any regard for truth. As a result plaintiff seeks an award of exemplary damages against all defendants for libel per se.

THIRD CAUSE OF ACTION

**(Plaintiff JOHNNIE L. COCHRAN, JR.,
Against All Defendants for Slander)**

19. Plaintiff incorporates and realleges all previous allegations contained in this Complaint as though fully set forth herein.

20. As a result of the published statements as set forth by defendants in paragraphs 6 and 9, defendants, and each of them, have orally published false and unprivileged statements which accuse plaintiff of crime(s) of theft and misappropriation and which are intended to directly injure plaintiff in his profession and business by imputing to him a reputation as a dishonest, incompetent and disreputable attorney, thus generally disqualifying him from the practice of law.

21. As a proximate result of the maliciously false and defamatory publication of statements to third parties as set forth by defendants in paragraphs 6 and 9, plaintiff has suffered loss to his reputation, shame, mortification,

and hurt feelings all to his general damage to be determined according to proof.

22. As a further proximate result of the above-described oral publications, plaintiff has suffered special damages, including but not limited to injury to plaintiff's business, profession, and occupation, all to his injury in the sum according to proof but no less than $250,000.00.

23. The above-described publication was published by defendants, and each of them, with actual malice, oppression and fraud in that they were aware at the time of the falsity of their publication and thus, made said oral publications in bad faith out of hatred and ill-will misdirect towards plaintiffs, without any regard for truth. As a result plaintiff seeks an award of exemplary damages against all defendants for slander.

FOURTH CAUSE OF ACTION

(Plaintiff JOHNNIE L. COCHRAN, Jr. Against All Defendants for Slander Per Se)

24. Plaintiff incorporates and realleges all previous allegations contained in this Complaint as though fully set forth herein.

25. As a result of the oral publication of false and unprivileged statements as set forth by defendants in paragraphs 6 and 9, which are without the necessity of explanatory matter, defendants, and each of them, have published statements which are slanderous on their face, and thus, constitute slander per se.

26. As a proximate result of the maliciously false and defamatory publication of statements to third parties

as set forth by defendants in paragraphs 6 and 9, plaintiff has suffered loss to his reputation, shame, mortification, and hurt feelings all to his general damage to be determined according to proof.

27. The above-described publication was published by defendants, and each of them, with actual malice, oppression and fraud in that they were aware at the time of the falsity of their publication and thus, made said publications in bad faith out of hatred and ill-will misdirect towards plaintiff, without any regard for truth. As a result plaintiff seeks an award of exemplary damages against all defendants for slander per se.

FIFTH CAUSE OF ACTION

(Plaintiff JOHNNIE L. COCHRAN, Jr. Against All Invasion of Privacy – False Light Publicity)

28. Plaintiff incorporates and realleges all of the previous allegations as though fully set forth herein.

29. As a result of the statements set forth in paragraphs 5, 6 and 9 above, defendants, and each of them, have published false and defamatory statements of fact which have placed plaintiff in a false light to the general public, and plaintiff, seeks compensatory and punitive damages against all defendants for invasion of privacy.

SIXTH CAUSE OF ACTION

(Plaintiff, JOHNNIE L. COCHRAN, Jr. Against All Defendants for Temporary Restraining Order, Preliminary and Permanent Injunctions)

30. Plaintiff incorporates and realleges all previous allegations contained in this Complaint as though fully set forth herein.

31. Plaintiff has a personal and property interest for which injunctive relief is available to protect in that he is in possession of an occupational position as an attorney and maintains the right to conduct the established business of the law firm, Cochran, Cherry, Givens & Smith, located at 4929 Wilshire Boulevard – the site at which defendants, and each of them, have published and continue to publish false and defamatory statements of fact on an ongoing basis.

32. As a result of the statements set forth in paragraphs 5, 6 and 9 above, defendants, and each of them, wrongfully and unlawfully picket outside plaintiff's place of business located at 4929 Wilshire Boulevard by (i) use of misleading, deceptive and untruthful statements on placards and (ii) which are also broadcast over blow horns and loudspeakers to passers by.

33. On a number of occasions, plaintiff has demanded that defendants, each of them, stop their unlawful conduct described above. Defendants, each of them, have refused and still refuse to refrain from their untruthful picketing conduct.

34. Defendants' wrongful conduct, unless and until enjoined and restrained by order of this court, has caused and will continue to cause great and irreparable injury to

plaintiff in that plaintiff's personal and professional reputation has been exposed to contempt and ridicule and his occupation as a reputable attorney damaged by defendants' continued publication of false and defamatory statements.

35. Plaintiff has no adequate remedy of law for the injuries done to his occupation and business suffered to date and on an ongoing basis if defendants' conduct is not restrained in that monetary damages, while being suffered, will be insufficient as well as difficult for plaintiff to precisely quantify and determine with respect to the permanent damage done to plaintiff's reputation and resulting losses to his business.

36. As a result of defendants' wrongful conduct, plaintiff and his business have been irreparably harmed through loss of clients and have suffered damage to their reputation within the community. Plaintiff will be further damaged in like manner so long as defendants' wrongful conduct continues. Plaintiff will state the specific amount on proof of the damages when it becomes known as the full amount of damage is not yet known to plaintiff because the unlawful picketing activity is presently ongoing.

WHEREFORE, plaintiff requests relief as hereafter provided.

WHEREFORE, PLAINTIFF PRAYS:

ON THE FIRST, THIRD, AND FIFTH CAUSES OF ACTION

1) For attorney's fees, investigation fees, and expert witness fees incurred herein;

2) For costs of suit incurred herein;

3) For special damages of economic losses according to proof;

4) For general damages in an amount to be determined according to proof at trial;

5) For exemplary damages against in an amount to be determined according to proof at trial;

6) For such other and further relief as the court deems just and proper;

ON THE SECOND AND FOURTH CAUSES OF ACTION

1) For attorney's fees, investigation fees, and expert witness fees incurred herein;

2) For costs of suit incurred herein;

3) For general damages in an amount to be determined according to proof at trial;

4) For exemplary damages against in an amount to be determined according to proof at trial;

5) For such other and further relief as the court deems just and proper;

ON THE SIXTH CAUSE OF ACTION

1) For an order requiring defendants to show cause, if any they have, why they should not be enjoined as set forth in this first amended complaint, during the pendency of this action;

2) For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants, and each of them, and their agents, servants,

and employees, and all persons acting under, in concert with, or for them:

From picketing outside the premises of 4929 Wilshire publishing false, deceptive, and/or misleading statements depicted in placards and/or broadcast through blow horns and loudspeakers to passers by;

3) For special and general damages as may be ascertained and as are ascertained before final judgment in this action;

4) For costs of suit incurred in this action; and

5) For such other and further relief as the court deems proper.

Dated: October ___, 2001 NEMECEK & COLE

By: _____
JONATHAN B. COLE
Attorneys for Plaintiff
JOHNNIE L. COCHRAN, JR.

VERIFICATION

I, JOHNNIE L. COCHRAN, JR., am the plaintiff in the above-entitled action. I have read the foregoing first amended complaint and know its contents. The same is true of my own knowledge, except as to those matters that are alleged in the complaint on information and belief, and as to those matters, I believe them to be true.

I declare, under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October ___, 2001

JOHNNIE L. COCHRAN, JR.

ULYSSES TORY
5393 Fairiew Boulevard #3
Los Angeles, California 90056
(310) 649-1938
IN PRO PER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHNNIE L. COCHRAN, JR., Plaintiff, vs. ULYSSES TORY, and DOES 1 through 50 Inclusive, Defendants.	Case No. BC 239405 DEFENDANTS' ANSWER TO PLAINTIFF'S AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT/TEMPORARY INJUNCTIONS RESTRAINING ORDER; (PROPOSED) VERIFIED FIRST AMENDED COMPLAINT FOR DAMAGES DATE: October 30, 2001 TIME: 8:30 AM DEPT: 41 Trial Date: March 18, 2002 (Filed Oct. 19, 2001)

Defendant, ULYSSES TORY (hereinafter referred to as "TORY) answers the complaint of Plaintiff, JOHNNIE L. COCHRAN, JR., by alleging as follows:

I. GENERAL DENIAL

1. Under the provisions of *Code of Civil Procedure* § 431.30, these answering Defendants deny generally and specifically each and every allegation contained in the

Complaint, and the whole thereof, and each and every alleged cause of action thereof and denies [sic] that the Plaintiff has sustained or will sustain any damages by reason of any act, breach or omission on the part of this answering Defendant.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

2. TORY allege that Plaintiff's Complaint, and the one & only cause of action therein, fails to state facts sufficient to constitute a cause of action against him, in accordance with the provisions of Code of Civil Procedure § 430.10 (e).

SECOND AFFIRMATIVE DEFENSE

(Injunction constitutes a Prior Restraint)

3. Defendant TORY is informed and believe, and based thereon allege, that the issuance of a preliminary and/or permanent injunction against his picketing activities as proposed in the Complaint would constitute an unconstitutional prior restraint.

THIRD AFFIRMATIVE DEFENSE

(Laches)

4. Defendant TORY is informed and believe and based thereon allege that Plaintiff is estopped from requesting preliminary and permanent injunctions against them by the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

(Unclean Hands)

5. Defendant TORY is informed and believe and based thereon allege that Plaintiff's conduct relative to this answering Defendant and the relationship between this Plaintiff and th [sic] answering Defendant was such as to bring a Complaint against these answering Defendants with unclean hands, and as such is estopped from pursuing these injunctions.

FIFTH AFFIRMATIVE DEFENSE

(Frivolous Complaint)

6. Defendant TORY is informed and believe, and based thereon allege that the Complaint filed by Plaintiff against them was brought without reasonable care and without a good faith belief that there was a justiciable controversy under the facts and the law which warranted the filing of the Complaint against Defendant. Therefore, Plaintiff should be responsible for all of TORY's necessary and reasonable defense costs, including attorneys' fees, as more particularly set forth in *Code of Civil Procedure* § 1038.

SIXTH AFFIRMATIVE DEFENSE

(Waiver)

7. Defendant TORY is informed and believe, and based thereon allege that Plaintiff has waived its right to sue based on the alleged actions and omissions of the Defendants described in the Complaint because it has tolerated such alleged actions and omissions since 1985.

SEVENTH AFFIRMATIVE DEFENSE

(*Code of Civil Procedure* § 425.16)

8. Defendant TORY is informed and believe and based thereon allege that Plaintiff, in bringing this action, has infringed upon their rights in violation of *Code of Civil Procedure* § 425.16.

EIGHTH AFFIRMATIVE DEFENSE

(Truth and Privilege)

9. Defendant TORY assert that to the extent that Plaintiff claims defamation in its Complaint, truth is an absolute defense to such claims. As such, Defendant TORY is informed and believe, and based thereon allege that his statements, the statements of other Defendants in this action, and the statements on the placards are defensible as true.

10. In addition, Defendant TORY is informed and believe and based thereon allege that any statements made by them or other unnamed Defendants, as well as statements on their placards are privileged because they are in exercise of the Defendants' First Amendment rights.

NINTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

11. Defendant TORY allege that Plaintiff's Complaint for Preliminary and Permanent Injunctions is barred by applicable statutes of limitations, including, but not limited to Sections 338 and 340 of the *Code of Civil Procedure*.

WHEREFORE, DEFENDANT TORY pray that:

1. Plaintiff is denied its preliminary and permanent injunctions requested in its Complaint on file herein;

2. For attorney's fees, pursuant to *Code of Civil Procedure* § 128.5;

3. For costs of suit incurred herein; and

4. For such other and further relief as the Court may deem just and proper.

Dated: October 18th, 2001 /s/ By: Ulysses Tory
ULYSSES TORY

ULYSSES TORY
5393 Fairview Boulevard, #3
Los Angeles, California 90056
(310) 649-1938

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHNNIE L. COCHRAN, JR. Plaintiff, vs. ULYSSES TORY; and DOES 1 through 50, inclusive, Defendants.	) Case No. BC239405)) DEFENDANT TORY'S) OBJECTIONS TO STATE-) MENT OF DECISION) PURSUANT TO RULE) OF COURT SECTION) 232 AND CODE OF) CIVIL PROCEDURE) SECTION 632)) Date: April 24, 2002) Time: 8:30 a.m.) Dept: "41")) (Filed Apr. 11, 2002)

This action came on for trial of the equitable issues before this court, on March 19, 2002, March 20, 2002 and March 21, 2002, in Department 41, the Honorable Ronald Sohigian, presiding without jury. ULYSSES TORY ("TORY") appeared in pro per and Jonathan B. Cole, Esq. of Nemecek & Cole appeared as counsel for Plaintiff JOHNNIE L. COCHRAN, JR. ("COCHRAN"). The court, having heard and adjudicated the factual and legal questions determined that COCHRAN was entitled to the permanent injunctive relief he sought to preclude TORY from picketing and making false and defamatory written and oral comments about COCHRAN.

Oral and documentary evidence to said factual and legal questions was introduced on the behalf [sic] plaintiff and partially on the behalf of the defendant and the cause was argued and submitted for decision. The court having considered the evidence and heard the arguments, found that the facts and the law supported the issuance of a permanent injunction against TORY, and granted COCHRAN the injunctive relief he sought, as set forth in the separately filed Permanent Injunction.

TORY's objections to this permanent injunction is based on his believeth [sic] that the modification of his present picketing activities and writings/publications would be protected under the First Amendment (Freedom of Expression) to the United States Constitution and Fourteenth Amendment (Sections 5. and 1. Enforcement of Civil Rights Statues [sic]) of the United States Constitution. TORY further believes that COCHRAN is a public figure and therefore, must be held at a higher standard than a private citizen in a matter or issue of libel, slander and invasion of privacy.

TORY, while is not familar [sic] with all the technical rules of discovery, evidence, trial/hearing procedures and the law did his best to present his case fairly and honestly and, unlike the plaintiff's counsel who consistantly [sic] tried to take advantage of the defendant's position/situation.

TORY therefore, ojects [sic] to plaintiff's counsel interpretation of the Statement of Decicion [sic] as its contents reflects [sic] repetitive half truths, hearsay and speculation according to the court transcripts (Uncertified Rough Draft) herein attached, and upon the Defendant TORY makes his objections:

Page 2, line 27 objection

Page 3, lines 2 to 15 objection

Page 3 lines 21 and 22 objection

Page 3 line 28 objection

Page 4, line 12 objection

Page 4, lines 17 to 28 objection

page 5, lines 1 to 13 objection

Page 5, lines 15 and 16 objection

Page 5, lines 25 to 28 objection

Page 6 lines 1 to 6 objection

Page 6, line 21 objection

Pages 7; 8,9 and 10, lines 1 to 28 objection.

TORY believes that the issuance of a permanent injunction [sic] his modified picketing activities as proposed in this Statement of Decision would constitue [sic] an unconstitutional restraint.

Date April 11th, 2002 /s/ Ulysses Tory
ULYSSES TORY In Pro Per

[Uncertified Rough Draft Omitted In Printing]

ULYSSES TORY
5393 Fairiew Boulevard #3
Los Angeles, California 90056
(310) 649-1938

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHNNIE L. COCHRAN, JR., Plaintiff, vs. ULYSSES TORY, and DOES 1 through 50 inclusive, Defendants.	Case No. BC239405 DEFENDANT TORY'S OBJECTION TO PERMANENT INJUNCTION Date: April 24, 2002 Time: 8:30 a.m. Dept: "41" Trial Date: March 18, 2002

(Filed Apr. 11, 2002)

WHEREAS, this action came on for trial on March 19, 2002, March 20, 2002 and March 21, 2002, in Department 41, the Honorable Ronald Sohigian, presiding without jury, and was tried on these dates;

WHEREAS, oral and documentary evidence was introduced on the behalf of the plaintiff and partially on the behalf of the defendant and cause was argued and submitted for decision;

The Court, having considered the evidence and heard the arguments of counsel, ULYSSES TORY ("TORY") objects to the issuance of a permanent injunction against him, employees, agents representatives, and all persons acting in concert, cooperation or participation with him, and further objects to the insert/named Ruth Craft, being named only in the Permanent Injunction as Ruth Craft

was not allowed to participate or defend herself at trial. (Page 3, line 4.)

Dated: April 11th, 2002 /s/ Ulysses Tory
ULYSSES TORY iIn [sic]
Pro Per

JONATHAN B. COLE (70460)
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Attorneys for JOHNNIE L. COCHRAN, JR.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHNNIE L. COCHRAN, JR., Plaintiff, vs. ULYSSES TORY; and DOES 1 through 50, inclusive, Defendants	Case No. BC239405 The Honorable Ronald Sohigian **PERMANENT INJUNCTION** DATE: April 24, 2002 TIME: 8:30 a.m. DEPT: "41" TRIAL DATE: March 18, 2002 (Filed Apr. 24, 2002)

WHEREAS, the above-entitled cause came on regularly for trial on March 19, 2002, March 20, 2002 and March 21, 2002, in Department 41 of the above-entitled court, the Honorable Ronald Sohigian, Judge, presiding without jury, and was tried on that date;

WHEREAS, oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision;

The Court, having considered the evidence and heard the arguments of counsel and being fully advised, hereby

issues the following permanent injunction against ULYSSES TORY ("TORY");

Unless until this Court, after notice to JOHNNIE L. COCHRAN, JR. ("COCHRAN") and opportunity for him to be heard, modifies or vacates this order, it is ordered that TORY, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined from engaging in any of the following:

1. Standing, assembling or approaching within three hundred (300) yards of (i) COCHRAN; or (ii) COCHRAN's place of business located at 4929 Wilshire Blvd., Los Angeles, CA 90010;

2. In any public forum, including, but not limited to, the Los Angeles Superior Court and any other place at which COCHRAN appears for the purpose of practicing law: (i) picketing COCHRAN and/or COCHRAN's law firm; (ii) displaying signs, placards or other written or printed material about COCHRAN and/or COCHRAN's law firm; (iii) orally uttering statements about COCHRAN and/or COCHRAN's law firm; and,

3. Contacting, harassing, threatening, stalking, disturbing the peace of, keeping under surveillance or blocking the movements of COCHRAN.

IT IS SO ORDERED.

DATED: April 24, 2002.

RONALD M. SOHIGIAN
RONALD M. SOHIGIAN
JUDGE OF THE LOS ANGELES
SUPERIOR COURT

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Attorneys for JOHNNIE L. COCHRAN, JR.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

	) Case No. BC239405
	) The Honorable Ronald Sohigian
JOHNNIE L. COCHRAN, JR.	) (Filed Apr. 24, 2002)
Plaintiff,	) STATEMENT OF DECISION PURSUANT TO *RULE OF COURT* SECTION 232 AND *CODE OF CIVIL PROCEDURE* SECTION 632
vs.	
ULYSSES TORY; and DOES 1 through 50, inclusive.	
Defendants.	) DATE: April 24, 2002 TIME: 8:30 a.m. DEPT: 41

The above-entitled cause came on regularly for trial of the equitable issue of plaintiff's request for injunctive relief, on March 19, 2002, March 20, 2002 and March 21, 2002, in Department 41 of the above-entitled court, the Honorable Ronald Sohigian, Judge, presiding without jury. Jonathan B. Cole, Esq. of Nemecek & Cole appeared as counsel for plaintiff JOHNNIE L. COCHRAN,

JR. ("COCHRAN"), and ULYSSES TORY ("TORY") appeared in pro per. The Court, having ordered this matter bifurcated on February 20, 2002, proceeded to hear and adjudicate the factual and legal questions necessary to determine whether COCHRAN was entitled to the permanent injunctive relief he sought to preclude TORY from picketing and making false and defamatory written and oral comments about COCHRAN in connection therewith.

Oral and documentary evidence material to said factual and legal questions was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The Court, having considered the evidence and heard the arguments of counsel and being fully advised, found that the facts and the law supported the issuance of a permanent injunction against TORY, and granted COCHRAN the injunctive relief he sought, as set forth in the separately filed Permanent Injunction.

In so doing, the Court (as discussed at the February 20, 2002 status conference) "evaluate[d] the lawfulness of [TORY'S] picketing conduct" and, in connection therewith, was necessarily "required to make a determination as to the 'truthfulness' of the statements at issue" which did "in effect lead to findings with respect to COCHRAN's defamation and invasion of privacy causes of action" [Notice of Ruling re February 20, 2002 Status Conference]. As such, subsumed in the findings of fact and conclusions of law made by the Court for the purpose of determining the propriety of injunctive relief, are findings that, with the exception of the existence and amount of damages, all of the elements of the tort theories advanced by COCHRAN (libel, libel per se,

slander, slander per se, and invasion of privacy (false light)) were established concurrently with COCHRAN's establishing his right to equitable relief. The issues so subsumed in the equitable issue which has been tried by this Court need not (indeed may not) be retried (*Golden West Baseball Company v. City of Anaheim* (1994) 25 Cal.App.4th 11, 50; see also *Walton v. Walton* (1995) 31 Cal.App.4th 277; *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671; *Union Oil of California v. Reconstruction Oil Company et al.* (1943) 58 Cal.App.2d 30).

Based thereon, this Court hereby issues the following statement of decision:

1. This Court finds that COCHRAN is entitled to permanent injunctive relief as set forth in the separately filed Permanent Injunction because pecuniary compensation will not afford COCHRAN adequate relief and the restraint is necessary to prevent a multiplicity of judicial proceedings.

    a. This Court bases its decision on the following facts which it finds, based on admissible evidence offered and admitted at trial:

        (1) TORY retained COCHRAN on a contingency basis in early 1983 in the matter of *TORY, et al. v. City of Los Angeles, et al.*, Case No. C473 832;

        (2) On or about July 18, 1985, TORY, with the assistance of his putative wife, Ruth Craft ("Craft"), wrote COCHRAN a threatening letter accusing COCHRAN of conspiring against him and demanding $10 million dollars:

        (3) The July 18, 1985 letter in effect demanded that COCHRAN make payments of money to TORY, apparently as a return of legal fees that TORY and/or Craft paid to Earl Evans, Esq. ("Evans");

        (4) Evans was a space-for-services tenant in COCHRAN's law suite at 4929 Wilshire Boulevard and was not a partner of COCHRAN;

        (5) TORY and Craft knew and recognized that Evans and COCHRAN were not partners as evidenced by, among other things, the fact that all the checks for legal services rendered for TORY and/or Craft are made payable to Evans, not to COCHRAN;

        (6) The contents of the July 18, 1985 letter are inaccurate and constitute obviously unreasonable demands;

        (7) COCHRAN owes no money whatsoever to TORY;

        (8) TORY never paid COCHRAN any money at all for legal services or any other purpose;

        (9) COCHRAN responded to TORY's July 18, 1985 letter by letter dated July 30, 1985 and subsequently sought and obtained an order relieving him as counsel for TORY in the matter of *TORY, et al. v. City of Los Angeles, et al.*;

        (10) COCHRAN was justified in seeking to be relieved as counsel for TORY because it was essentially impossible for COCHRAN to continue to represent

TORY under the circumstances following the letter of July 18, 1985;

(11) TORY and Craft complained to the State Bar about COCHRAN and Evans, but the State Bar took no action except to tell them that their asserted grievances as to Evans and COCHRAN were fee disputes rather than disputes regarding disciplinable matters;

(12) TORY and Craft did not go forward with fee-related litigation or arbitration against COCHRAN or Evans;

(13) It is not true, as TORY alleged, that Evans' representation in various family law matters for Craft was deficient or that Craft prevailed in a federal court action regarding her child custody matters;

(14) What actually happened in connection with Craft's family law dispute according to Craft's own testimony is that she lost in the state court and lost in the federal courts after that, but that her former husband voluntarily turned the children over to her, which is no reflection at all on the quality of legal representation rendered by Evans;

(15) Beginning before January 2000 but also in and after January 2000 TORY and various agents of TORY have regularly picketed COCHRAN's office in Los Angeles at 4929 Wilshire Boulevard, and the Los Angeles Superior Court with placards;

(16) The placards used by TORY contain slogans such as (1) "Johnnie is a crook, a liar and a thief. Can a lawyer go to heaven? Luke 11:46"; (2) "Hey Johnnie How Much Did They Pay$$You to F_ _k Me?"; (3) "You've been a BAD, BAD boy, Johnnie Cochran"; (4) "Attorney COCHRAN We have no Use for Illegal Abuse"; (5) I Know How it Feels to be Terrorized; (6) Absolute Discrimination; (7) "Attorney Cochran, Don't We Deserve at Least the Same Justice as O.J.?"; (8) Unless You Have O.J.'s Millions You'll be Screwed if You Use J.L. Cochran, Esq."; (9) Johnnie L. Cochran, Esq., Your Piss is Not Rain; (10) "Attn: Attorney Johnnie L. Cochran, Jr., Flaunting and Flossing It's the People He's Costing"; (11) Attorney Johnnie, It's Past Time; (12) Johnnie Cochran I Know What You, the County and the city did [sic] my case"; and, (13) "Don't Laugh, Cochran Screwed You Guys Too." These slogans and the statements made therein are untruthful, misleading and malicious.

(17) After the commencement of this litigation, the conduct of TORY and his agents worsened as the band of picketers supplemented the placards with additional banners and loud chanting of obscene statements.

(18) The statements made by TORY and his agents also included statements to the effect that COCHRAN owed a substantial amount of money to TORY; that COCHRAN owed debts to TORY based

on breaches of past oral and written agreement that COCHRAN acted dishonestly or below the standard of care in prior legal representation of TORY; and that Cochran is a bad character and/or a substandard practitioner of law. These statements, too, are untruthful, misleading and malicious.

(19) COCHRAN is a public figure.

(20) All of the aforementioned statements made were false when they were made; were made maliciously and with reckless disregard for the truth; and were actually made for the purpose of inducing COCHRAN to pay TORY various amounts of money to which TORY was not entitled;

(21) All the people who were involved in the picketing, including but not necessarily limited to Craft, were the agents of TORY acting within the course and scope of their agency during the times that they were picketing, preparing signs, and speaking at the premises at 4929 Wilshire Boulevard, Los Angeles, and in front of the Los Angeles Superior Court courthouse.

(22) TORY and his agents, including but not necessarily limited to Craft, were aware of the falsity of the statements when they were made;

(23) The picketing conduct of TORY and his agents was intentionally targeted at preventing person(s) from entering COCHRAN's place of business for legal

services and creating a negatively charged and ominous environment.

(24) Despite repeated requests, TORY has refused to cease his picketing efforts unless he was paid a monetary "settlement" by COCHRAN.

(25) TORY and his agents and [sic] made false statements in the picketing, both expressly and impliedly, and orally and in writing.

(26) TORY has indicated that unless prevented by a judgment or some other process of this court he will continue to picket, and the Court finds that he would.

(27) This is not a matter of speech related issues: it is simply the use of false and defamatory and privacy-invading communications to coerce or attempt to improperly coerce payment of money in tribute for or premium for desisting from that type of activity.

(28) TORY has claimed to have no means by which a monetary award could be satisfactorily paid.

(29) COCHRAN has no remedy which is plain, speedy, and adequate except for injunctive relief.

(30) In the absence of injunctive relief, COCHRAN will be irreparably harmed by the conduct of TORY about which COCHRAN complains herein.

(31) TORY's behavior is not protectable and his conduct is enjoinable.

(32) The order for injunctive relief the court is making now is absolutely necessary in order to prevent a multiplicity of actions.

b. The legal basis for this Court's decision that COCHRAN is entitled to injunctive relief is:

(1) "[A] final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant; Where pecuniary compensation would not afford adequate relief; Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; 3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings . . . "(*Civil Code* Section 3422; see also *Remillard-Dandini v. Dandini* (1941) 46 Cal.App.2d 678, 680);

(2) Picketing and use of banners and/or signs containing false and misleading allegations and orally uttering false and misleading statements support the grant of an injunction (*San Antonio Community Hospital v. Southern California District Council of Carpenters*, (1997) 125 F.3d 1230, 1237 citing *Mercy Health Services v. 1199 Health & Human Services Employees Union* (W.D. Mich. 1995) 888 F. Supp. 828, 838.)

(3) Reputation is "difficult to restore once it has been tainted" and hence injury to reputation is "irreparable" within the meaning or the requirements for injunctive relief (*Id.* at 1238).

(4) TORY's malicious picketing is likely to damage COCHRAN's professional reputation is for an improper purpose and, as such, is enjoinable.

2. This court finds that TORY and his agents engaged in libelous activity.

(a) This Court bases its decision on the facts found, based on admissible evidence offered and admitted at trial identified at paragraphs 1.a.(1) through (25), above.

(b) The legal basis for this Court's decision that TORY and his agents engaged in libelous activity is:

(1) California *Civil Code* section 45 defines "libel" as:

"a (i) false and (ii) unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, (iii) which exposes any person to hatred, contempt, ridicule, or obloquy, or (iv) which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

(2) The written statements made by TORY and his agents in connection with the picketing described above are false and unprivileged and had a tendency to injure COCHRAN in his occupation as an attorney.

(3) No recognized privilege pursuant to California *Code of Civil Procedure* section 47, or any other provision of law, applies to TORY's picketing actions, nor

can TORY support an affirmative defense of truth.

3. This Court finds that TORY and his agents engaged in libel per se.

a. This Court bases its decision on the facts found, based on admissible evidence offered and admitted at trial, identified at paragraphs 1.a.(1) through (25), above.

b. The legal basis for this Court's decision that TORY and his agents engaged in libel per se is:

(1) California *Civil Code* section 45a defines "libel *per se*" or "libel on its face" as; "a libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact."

(2) The definition of "libel per se" is "very broad [and] include[s] almost any language which, upon its face, ha[s] a natural tendency to injure a person's reputation, either generally, or with respect to his occupation (*Bates v. Campbell* (1931) 213 Cal. 438).

(3) In construing language charged as libelous it is necessary to consider the publication as a whole (*Stevens v. Snow* (1923) 191 Cal. 58).

(4) The court in determining whether or not there is a libel *per se* "must place itself in the position of a reader under the circumstances of the publication." (*Rosenberg v. J.C. Penney Co.* (1939) 30 Cal.App.2d 609, 619; *Bettner v. Holt* (1886) 70 Cal. 270).

(5) Here, as in *Rosenberg, supra*, "the language and meaning of the placards are so plain that it was not necessary to resort to the innuendo and while some of the language may have been free from any libel, it is sufficient to support an action where the gist of the language contains the objectionable charge or insinuation, and here the charges upon the placards lead to the conclusion that plaintiff's were accused of dishonesty in dealing with their customers, thereby injuring the business and its good reputation." (*Id.* at 622.)

4. This Court finds that TORY and his agents engaged in acts which are both slanderous and slanderous per se.

a. This Court bases its decision on the facts found, based on admissible evidence offered and admitted at trial, identified at paragraphs 1.a.(1) through (25), above.

b. The legal basis for this Court's decision that TORY and his agents engaged in slander and slander per se is:

(1) California *Civil Code* section 46 defines "slander," in pertinent part as: "a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: (1) Charges any person with crime, or with having been indicted, convicted, or punished for crime; . . . (3) Tends directly to injure

him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; . . . or (5) Which, by natural consequence, causes actual damage."

(2) "Words which fall within the purview of *Civil Code* Section 46 are deemed to constitute slander per se (*Douglas v. Janis* (1974) 46 Cal.App.3d 931; *Contento v. Mitchell* (1972) 28 Cal.App.3d 356) with the effect that the utterance of such words is actionable without proof of special damage (*Correin v. Santos* (1961) 191 Cal.App.2d 844)" (*Albertini v. Shaefer* (1979) 97 Cal.App.3d 822, 829).

(3) "A fair construction of *Civil Code* section 46 requires a holding that calling an attorney a 'crook' is . . . actionable as slander per se . . . imputing dishonesty or lack of ethics to an attorney is also actionable under *Civil Code* section 46 because of the probability of damage to professional reputation (*Katz v. Rosen* (1975) 48 Cal.App.3d 1032)" (*Id.* at 829-830).

(4) TORY made false and unprivileged publications orally and through loudspeakers which tended to directly injure COCHRAN in respect to his profession, trade or business by imputing to him

general disqualification in those respects which the occupation of attorney at law peculiarly requires and by imputing things which have a natural tendency to lessen his profits.

5. This Court finds that TORY violated COCHRAN's privacy by creating publicity which placed him in a false light in the public's eye.

a. This Court bases its decision on the facts found, based on admissible evidence offered and admitted at trial, identified at paragraphs 1.a.(1) through (25), above.

b. The legal basis for this Court's decision that TORY and his agents engaged in "false light" invasion of privacy is:

(1) Courts recognize as tortious "invasion of privacy," publicity which places the plaintiff in a false light in the public eye, (*Kinsey v. Maeur* (1980) 107 Cal.App.3d 265, 270; see Prosser, *Law of Torts* (4th ed., 1971) s 117, pp. 804-814.)

(2) The interest protected by the false light invasion of privacy tort is individual freedom from the wrongful publicizing of private affairs and activities which are outside the realm of legitimate public concern. (See *Coverstone v. Davies* (1952) 38 Cal.2d 315, 323; *Stryker v. Republic Pictures Corp.* (1951) 108 Cal.App.2d 191, 194).

(3) "[T]he scope of an actionable invasion of privacy includes not only true but derogatory statements about an individual, but also statements that falsely

attribute offensive behavior to him." (*Selleck v. Globe* (1985) 166 Cal.App.3d 1123, 1135 citing *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 239 P.2d 630.)

(4) "Inasmuch as plaintiff's claim for false light invasion of privacy is based on the facts alleged in his claim for libel, he likewise is not required to plead special damages in order to state a cause of action for false light [invasion of privacy]." (*Selleck v. Globe* (1985) 166 Cal.App.3d 1123).

(5) TORY's publicized statements are not only false and defamatory in nature but falsely attribute offensive behavior to COCHRAN and have violated his right of privacy concerning his peace of mind to be free from such false publications.

DATED: APR. 24, 2002 RONALD M. SOHIGIAN
RONALD SOHEGIAN
JUDGE OF THE
LOS ANGELES
SUPERIOR COURT

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California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHNNIE L. COCHRAN, Plaintiff and Respondent, v. ULYSSES TORY et al., Defendants and Appellants.	B159437 (Los Angeles County Super. Ct. No. BC239405) (Filed Oct. 29, 2003)

APPEAL from an order of the Superior Court of Los Angeles County, Ronald M. Sohigian, Judge. Affirmed.

Davis Wright Tremaine, Gary L. Bostwick, Alonzo Wickers IV; Loeb & Loeb, Douglas E. Mirell and Jean-Paul Jassy for Defendants and Appellants.

Nemecek & Cole, Jonathan B. Cole and Karen K. Coffin for Plaintiff and Respondent.

A lawyer sued a former client for defamation and invasion of privacy. The lawyer prevailed, and the trial court (based on a finding that damages were inadequate under the circumstances) issued a permanent injunction. We reject the former client's challenges to the injunction and affirm.

FACTS

A.

In 1983, Ulysses Tory and Javier Gutierrez (who had been involved in a "shoot out" with the Los Angeles Police Department) retained Johnnie L. Cochran, Jr. to represent them in a personal injury action against the City of Los Angeles and others. Cochran filed the action and settled Gutierrez's claim, but not Tory's, and Tory became unhappy with the manner in which Cochran was representing him.

In July 1985, Tory wrote to Cochran, complaining that Cochran was conspiring with the City "to cover up criminal and immoral activities to private citizens for political gains. . . ." Tory said he would "settle" his conspiracy claims against Cochran and "refrain from any public discussions of conspiracy or scandal" if Cochran quickly paid him $10 million "or very close to it." Cochran, in turn, filed a motion to withdraw as Tory's lawyer, and the motion was granted in November. No fees were due (it was a contingency case) and none were paid.

B.

In July 1995 (after ten years of silence and at which time Cochran was receiving a great deal of publicity as one of the defense lawyers in O.J. Simpson's criminal trial), Tory again wrote to Cochran, demanded that Cochran return money that Tory had paid to Earl E. Evans, a lawyer who Tory said had "allegedly represented [Tory and his putative spouse, Ruth Craft] in matters of Divorce, Child Custody, Order to Show Cause and Union Bank!!!" Cochran did not respond.[1]

C.

In the late 1990's, Tory and a troop of people began picketing outside Cochran's office and outside the Los Angeles Superior Court, carrying placards with these statements:

> "Johnnie is a crook, a liar and a Thief. Can a lawyer go to HEAVEN? Luke 11:46"
>
> "Hey Johnnie, How Much Did They Pay $$ You to F--- Me?"
>
> "You've been a BAD BAD boy, Johnnie L. Cochran"

---

[1] Although Tory's letter referred to Evans as one of Cochran's "associates," there was no such relationship. During the 1980's, Evans was Cochran's tenant and paid for the space by providing limited legal services for Cochran. One such task was the "intake interview" when Tory first consulted Cochran in 1985, but Evans did not perform any other services for Cochran with regard to Tory's personal injury case (and that was the only case in which Cochran ever represented Tory). Evans, meanwhile had been directly retained by Tory and Craft to handle some family law matters.

"Att[orne]y COCHRAN, We have no Use for Illegal Abuse"

"I Know How it Feels to be Terrorized. God Bless USA"

"Absolute Discrimination"

"Attorney Cochran, Don't We Deserve at Least the same Justice As O.J.?"

"Unless You have O.J.'s Millions – You'll be Screwed if You USE J.L. Cochran, Esq."

"Johnnie L. Cochran, Esq., Your Piss is Not Rain"

"Attn: Attorney Johnnie L. Cochran, Jr., Flaunting and Flossing, It's the People He's Costing"

"Attorney Johnnie, It's Past Time!!!"

"Johnnie Cochran I Know WHAT You, the County and city DID to my CASE"

"DON'T LAUGH, COCHRAN SCREWED YOU GUYS TOO!"

What can I do if I don't receive the Justice the Constitution guarantees ME?

Of all the picketers, only Tory and possibly one other person had been Cochran's clients. Tory transported the picketers to Cochran's office and to the courthouse, bought lunch for all of them, and admitted the "possibility" that some of the picketers joined him only because they wanted a free lunch. In October 2000, while the picketing continued, Tory wrote to Cochran, demanded the return of $6,500 allegedly paid to Evans, and also demanded another $15,000 from Cochran to "compensate"

him for his "time and efforts to bring this entire matter to closure. . . ."

D.

Cochran filed this lawsuit against Tory in October 2000, alleging causes of action for defamation and invasion of privacy.[2] Tory answered, and represented himself throughout the trial court proceedings. A preliminary injunction was issued, discovery was conducted, and the case was tried to the court in March 2002. In its statement of decision, the trial court found that Cochran was entitled to a permanent injunction against Tory because Tory's statements were false and were made with knowledge of their falsity, "maliciously and with reckless disregard for the truth [and] for the purpose of inducing Cochran to pay Tory various amounts of money to which Tory was not entitled." The court enjoined Tory as follows:

> "[I]t is ordered that Tory, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined from engaging in any of the following:
>
> "1. Standing, assembling or approaching within [300 yards] of (i) Cochran; or (ii) Cochran's place of business . . . ;

[2] The trial court found that, after "the commencement of this litigation, [Tory's conduct] worsened as the band of picketers supplemented the placards with additional banners and loud chanting of obscene statements."

"2. In any public forum, including, but not limited to, the Los Angeles Superior Court and any other place at which Cochran appears for the purpose of practicing law: (i) picketing Cochran [or] Cochran's law firm; (ii) displaying signs, placards or other written or printed material about Cochran [or] Cochran's law firm; (iii) orally uttering statements about Cochran [or] Cochran's law firm; and

"3. Contacting, harassing, threatening, stalking, disturbing the peace of, keeping under surveillance or blocking the movements of Cochran."

Tory (now represented by counsel and purportedly joined by Ruth Craft, who is restrained by the injunction in her capacity as Tory's agent) appeals.

DISCUSSION

I.

Tory contends "the second numbered paragraph" of the permanent injunction is a "particularly egregious" prior restraint and, as such, unconstitutional under both the federal and state constitutions. We disagree.

Although a prior restraint can be presumptively unconstitutional, that rule has no application where, as here, an injunction against a private person operates "to redress alleged private wrongs," not to suppress a legitimate publication. (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 418-419.) The injunction in this case was issued based on the trial court's findings – after a full trial on the merits – that Tory's statements were both libelous and slanderous within the meaning of Civil Code

sections 45 and 46, and that pecuniary compensation would not afford an adequate remedy. As a result, the second numbered paragraph "was issued only after the [trial court] determined that [Tory] had engaged in [unlawful activity], and the order simply preclude[s Tory] from continuing [his] unlawful activity." (Cf. *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 138.)

As our Supreme Court explained in *Aguilar,* the special vice of a prior restraint is that it suppresses communication before there has been an adequate determination that the speech is unprotected under the First Amendment. Once there has been a final adjudication on the merits that the speech is unprotected, an injunction restraining that speech does not constitute an impermissible prior restraint. (*Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th at p. 141.) In *Aguilar,* the Court held that "the pervasive use of racial epithets that has been judicially determined to violate the FEHA is not protected by the First Amendment, and such unlawful conduct properly may be enjoined." (*Id.* at pp. 141-142.) By parity of reason, the same is true here, where the pervasive use of libelous and slanderous statements have been judicially determined to violate Civil Code sections 45 and 46.[3]

II.

Alternatively, Tory contends the second numbered paragraph is "unconstitutionally overbroad." This is so, he claims, because it means he cannot "[p]raise [Cochran] as

[3] The same is true under the California Constitution. (*Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th at pp. 142-145.)

the finest lawyer of Los Angeles," "[i]nform people that [Cochran] represented O.J. Simpson," "[w]rite a 'letter to the editor' criticizing the court's ruling below," "[r]epublish or read aloud the Court of Appeal's decision in *Cochran v. Cochran* [(1998)] 65 Cal.App.4th 488 . . . , where parties alleged that Cochran made a death threat against them," "[a]ppear in court to challenge the [i]njunction," or "[t]ell friends, at a picnic in a public park: 'Johnnie Cochran was not very nice to me.'" We disagree.

The cases cited by Tory all construe language in preliminary injunctions (*Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d 1528) or statutes, ordinances, and the like (*NAACP v. Alabama* (1964) 377 U.S. 288; *In re Berry* (1968) 68 Cal.2d 137; *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470; *Gooding v. Wilson* (1972) 405 U.S. 518; *Houston v. Hill* (1987) 482 U.S. 451; *Schad v. Mount Ephraim* (1981) 452 U.S. 61; *Airport Comm'rs v. Jews for Jesus, Inc.* (1987) 482 U.S. 569; *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497), not permanent injunctions issued after a full trial on the merits and findings that the speech at issue is not protected. For the reasons explained in Part I, *ante,* Tory's cases have nothing to do with the permanent injunction issued in this case.

Based upon his prior unlawful conduct and his admissions in court that, absent restraint by the court, he would continue to picket Cochran, Tory has no basis for his challenge to the breadth of the injunction.[4]

[4] When asked whether he intended to keep picketing Cochran until Cochran paid him, Tory said, "It's a possibility." The court followed-up by asking Tory, "Do you desire to do more picketing of Mr. Cochran or with respect to your grievance against Mr. Cochran at any time at any place? . . . I just mean as things are today, no changes of position on

(Continued on following page)

III.

Tory contends the judgment is not supported by substantial evidence because (according to Tory) the evidence establishes only that he stated his opinion, not that he made "provably false" statements of fact. We disagree.

Substantial evidence shows that Tory "crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact." (*San Antonio Hosp. v. So. Cal. Council of Carpenters* (9th Cir. 1997) 125 F.3d 1230, 1237.) Tory's statements – such as, "Hey, Johnnie, how much did they pay $$ you to f--- me?" and "Johnnie Cochran, I know what you, the County and City did to my case," and "Johnnie is a crook, a liar and a thief," accuse Cochran of theft and of accepting money as a bribe to abandon Tory's case against the City and the County and, as such, constitute libel within the meaning of Civil Code section 45 – because a false statement reasonably calculated to induce the reader to understand that a person is guilty of a crime or is dishonest in his profession is sufficient to establish libel. (*Gallagher v. Chavalas* (1941) 48 Cal.App.2d 52, 59; *Goehring v. Wright* (N.D.Cal. 1994) 858 F.Supp. 989, 1004; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 471, p. 558; §§ 482-484, pp. 566-572.) No more was required. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-873.)[5]

anybody's part except, are you going to want to do more picketing . . . of Mr. Cochran with respect to these grievances at any place, at any time?" Tory answered, "I'm quite sure, Your Honor, I will protest against Mr. Cochran. . . . Yes. . . . Unless you order us not to."

[5] We summarily reject Tory's suggestion that the "context" of his statements shows they were mere opinion. In context, Tory was

(Continued on following page)

IV.

In a related argument, Tory contends the evidence is insufficient to establish that he acted with actual malice. Again, we disagree.

Assuming without deciding that Tory is entitled to the same protections afforded to a legitimate newspaper defending a libel action, and assuming that Cochran is (as he willingly concedes) a public figure, and thus assuming that this is a case in which we must review the evidence de novo to determine whether it supports the trial court's finding of actual malice (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 514; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842), we are satisfied that Tory acted with actual malice. Uncontroverted evidence establishes that Cochran did not owe any money to Tory, that Tory knew his statements were all false, and that he nevertheless set out to harass Cochran by hiring picketers to carry outrageous placards and repeatedly march in front of Cochran's office building and in front of the Los Angeles Superior Court. Under any standard, this is more than enough to show actual malice.

---

demanding money that wasn't owed to him, which to us supports the trial court's finding that Tory intended to go to any length to slander Cochran, and that he knowingly made false statements of fact.

DISPOSITION

The permanent injunction is affirmed. Cochran is entitled to his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL (MIRIAM A.), J.

We concur:

ORTEGA, Acting P.J.

MALLANO, J.

Court of Appeal, Second Appellate District,
Division One – No. B159437
S121121

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOHNNIE L. COCHRAN, Plaintiff and Respondent,

v.

ULYSSES TORY et al., Defendants and Appellants.

(Filed Jan. 28, 2004)

Petition for review DENIED.

George C.J., was absent and did not participate.

Kennard, J. and Brown, J., are of the opinion the petition should be granted.

/s/ WERDEGAR
Acting Chief Justice

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(6)

No. 03-1488

Supreme Court, U.S.
FILED
NOV 12 2004
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In The
Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

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QUESTION PRESENTED

Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.

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OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division One, is unpublished. (JA 51-61.)*

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review the October 29, 2003 decision of the Court of Appeal of the State of California, following a denial of discretionary review by the Supreme Court of California on January 28, 2004. (JA 51-62.) The petition for a writ of certiorari was filed on April 26, 2004, and was granted on September 28, 2004.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. I.

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* Citation to the Joint Appendix will be styled, "JA ___". Citation to the Reporter's Transcript from the trial proceedings in the Superior Court for the State of California will be styled, "RT ___". Citation to the Clerk's Transcript from the trial proceedings in the Superior Court for the State of California will be styled, "CT ___"

STATEMENT OF THE CASE

The California Court of Appeal affirmed a permanent injunction that forever prohibits Ulysses Tory and Ruth Craft from *all* future speech in any public forum – regardless of content or context – about an admitted public figure, Johnnie L. Cochran, Jr. (JA 52, JA 55-56, JA 60.)

This lawsuit arose from the events of earlier litigation where Petitioner Tory was represented by Cochran and his law firm. On February 18, 1983, Tory and one of his employees, Javier Gutierrez, emerged from Tory's Fish Market and were fired upon by law enforcement officials. (RT 6:8-11.) Shortly thereafter, Tory decided to retain Cochran in a personal injury and civil rights lawsuit against various government entities involved in the incident. (RT 6:11-13, 64:2-7; CT 47.) Tory went to Cochran's law office and was interviewed by an attorney named Earl Evans. (RT 64:5-10, 79:4-11.) Evans signed a retainer agreement on Cochran's behalf, establishing the attorney-client relationship between Tory and Cochran's law firm. (RT 64:5-10, 79:16-28, 118:1-8.)

Over the next two years, Tory became increasingly frustrated with what Tory perceived as Cochran's failure to pursue the litigation on his behalf. (RT 215:16-19, 274:2-18.) Tory felt that he was not being adequately represented. (RT 274:2-18, 180:12-27.) By contrast, Cochran was able to secure a substantial settlement for Gutierrez. (RT 36:10-24, 184:20-28, 216:1-5.) Cochran ultimately withdrew from representing Tory. (RT 174:18-174:3.)

During the same time period, Evans, who was still working at Cochran's law office and using Cochran's stationery, handled a divorce proceeding for Tory and child custody proceedings for Tory's putative spouse, Petitioner

Ruth Craft. (RT 6:24-7:2, 63:4-21, 78:12-28.) Tory and Craft paid Evans for his services under the impression that they were paying Evans as an agent of Cochran's law firm. (RT 189:3-7, 253:1-19.) Petitioners were not satisfied with Evans' services and wanted a refund of the monies that they had paid. (RT 6:26-7:2, 81:7-18, 176:21-25.) Tory and Craft testified under oath that Cochran offered to repay such monies to Petitioners. (RT 262:14-263:2.)

Several years later, with no refund forthcoming, Tory began peacefully picketing on the sidewalk outside of Cochran's Los Angeles law office and later in front of the Los Angeles Superior Court. (RT 222:2-16.) He picketed with a group of other people who also were dissatisfied with Cochran, including people Tory understood to be former clients of Cochran and relatives of former clients. (RT 208:22-26, 272:17-20.) Tory testified that he did not pay the other picketers, but that he "might have bought them lunch." (RT 208:27-209:23.) Tory picketed because he believed that he had not been treated fairly by Cochran, that he had not been represented adequately by Cochran, and that he had been deceived by Cochran into thinking that he would be refunded money. (RT 213:17-21, 216:6-12; 222:2-16, 274:2-18.)

Tory and others carried placards bearing various statements expressing opinions about Cochran's performance as an attorney and about the legal system generally, such as:

- "Johnnie is a crook, a liar, and a Thief. Can a lawyer go to HEAVEN? Luke 11:46"[1]

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[1] The reference is to Luke 11:46 in the Bible which reads: "And he said: 'Woe to you lawyers also! For you load men with burdens hard to

(Continued on following page)

- "What can I do if I don't receive the Justice the Constitution guarantees ME?"
- "You've been a BAD BOY, Johnnie L. Cochran"
- "Atty COCHRAN, We have no Use for Illegal Abuse"
- "I Know How it Feels to Be Terrorized. God Bless USA"
- "Absolute Discrimination"
- "Attorney Cochran, Don't We Deserve at Least the same Justice as O.J."
- "Unless You have O.J.'s Millions – You'll be Screwed if you USE J.L. Cochran, Esq." (JA 53-54.)

As a result of the picketing activity, Cochran sued Tory and Does for defamation (libel, libel *per se*, slander and slander *per se*) and false light invasion of privacy.[2] (JA 7-22.) The Superior Court for the State of California issued a preliminary injunction, prohibiting Tory from speaking about Cochran, and subsequently tried the suit without a jury. (JA 55.) Tory represented himself in the proceedings. (*Id.*) Cochran admitted at trial that he did not lose any business as a result of the picketing. (RT 55:20-28.)

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bear, and you yourselves do not touch the burdens with one of your fingers."

[2] In California, "[w]hen claims for [false light] invasion of privacy . . . are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed." *Couch v. San Juan Unified Sch. Dist.* 39 Cal.Rptr.2d 848, 856 (Cal.Ct.App. 1995). Cochran's false light claim is based on exactly the same allegations as his defamation claims. (JA 17.)

Tory consistently asserted his constitutional right to free speech in the trial court proceedings. For example, Tory's Answer to Cochran's operative complaint asserted that "the issuance of a preliminary and/or permanent injunction against his picketing activities as proposed in the Complaint would constitute an unconstitutional prior restraint." (JA 24.) Moreover, in his objections to the trial court's Statement of Decision, Tory protested that his picketing was "protected under the First Amendment (Freedom of Expression) to the United States Constitution," and further noted that Cochran "is a public figure and therefore, must be held at a higher standard than a private citizen in a matter or issue of libel, slander and invasion of privacy." (JA 29.)

The Superior Court found in Cochran's favor. (RT 275:4-6.) The Court did not award money damages because such damages were waived by Cochran.[3] The Superior Court noted that Cochran never proved the "existence and amount of damages." (JA 37-38.) But the Court did issue a permanent injunction, which provides, in pertinent part:

> Unless and until this Court, after notice to JOHNNIE L. COCHRAN, JR. ("COCHRAN") and opportunity for him to be heard, modifies or vacates this order, it is ordered that TORY, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined from engaging in any of the following: . . .

---

[3] *See* Reporter's Transcript of trial court proceedings on April 24, 2002, at 2:7-10 (Cochran's counsel: "We did have a right to proceed for money damages, but we're going to waive that right.")

> *In any public forum*, including, but not limited to, the Los Angeles Superior Court, and any other place at which COCHRAN appears for the purpose of practicing law: (i) picketing COCHRAN and/or COCHRAN's law firm; (ii) *displaying signs, placards or other written or printed material about COCHRAN and/or COCHRAN's law firm*; (iii) *orally uttering statements about COCHRAN and/or COCHRAN's law firm* . . . (JA 34.) (emphasis added)

Craft was not named as a defendant in the lawsuit, nor was she given a chance to defend herself at trial, but her speech rights were explicitly restrained in the permanent injunction. (RT 4:16-5:27; JA 34.) The injunction is not limited to preventing defamatory statements; it prohibits Tory and Craft from saying *anything* about Cochran in *any* "public forum." (JA 34.)

Tory and Craft timely appealed from the permanent injunction. (CT 118, 120.) The appeal focused primarily on the permanent injunction as an overbroad prior restraint on future speech issued in violation of the First Amendment and Article 1, Section 2(a) of the California Constitution. (JA 56-58.) The appeal also raised other issues implicating the First Amendment. The appeal asserted that all of the purported statements are protected opinion and/or hyperbole, and therefore none of the statements can give rise to a cause of action for defamation or false light invasion of privacy. (JA 59.) Also, the appeal submitted that Cochran, a public figure, failed to prove, under the constitutionally-mandated clear and convincing evidence standard, that Petitioners published any of the allegedly defamatory statements with actual malice. (JA 60.)

On October 29, 2003, the California Court of Appeal issued an unpublished decision affirming the injunction. (JA 51-61.) The California Court of Appeal rejected the contention that the permanent injunction represented an overbroad prior restraint in violation of the First Amendment and the California Constitution. (JA 56-58.) The decision states that permanent injunctions on speech are not prior restraints, and that the overbreadth doctrine does not apply to permanent injunctions. (*Id.*)

Tory and Craft timely petitioned the Supreme Court of California for review of the California Court of Appeal's decision. On January 28, 2004, the Supreme Court of California denied review of the California Court of Appeal's decision, with Justices Kennard and Brown voting to grant review. (JA 62.)

Tory and Craft have faithfully abided by the permanent injunction restricting their speech since the injunction was entered by the Superior Court on April 24, 2002. Under the terms of the Superior Court's order, Tory and Craft may speak about Cochran or his law firm only if they first gain permission of the Superior Court through a modification of its order. (JA 34.)

SUMMARY OF ARGUMENT

Never in the almost 213 year history of the First Amendment has this Court approved an injunction as a remedy in a defamation action. In its landmark ruling in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), this Court held that a permanent injunction is a prior restraint; that prior restraints are allowed in only the most limited and compelling circumstances; and that courts

may not enjoin future speech even when they find that defamation has occurred.

Contrary to these basic First Amendment principles, the California Court of Appeal upheld a permanent injunction that forever prohibits Tory and Craft from saying anything about Johnnie Cochran or his law firm in any public forum. The Court of Appeal erred for several key reasons.

First, the Court of Appeal wrongly held that a permanent injunction is not a prior restraint if it follows a trial. (JA 56-57.) This is incorrect because this Court clearly and consistently has ruled that a permanent injunction is a classic prior restraint, even when it is imposed as a remedy after a finding of liability. *See, e.g., Near,* 283 U.S. at 706; *Alexander v. United States*, 509 U.S. 544, 550 (1993); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417 (1971); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 311-12 (1980). Injunctions are prior restraints because they prevent future speech and because they require a defendant found liable for prior conduct to obtain a judge's permission before prospective speech occurs. In this case, Tory and Craft cannot say anything about Cochran until and unless they go back to the California Superior Court and have the judge modify the permanent injunction to permit the particular expression. Contrary to the Court of Appeal's holding, this is an obvious prior restraint.

Second, the Court of Appeal erred because it ruled that a permanent injunction is a permissible remedy in a defamation action brought by a public figure. (JA 56-57.) To the contrary, centuries of precedent, dating back to English law before the existence of the United States, establish that equitable relief is not available in defamation cases. *See,*

e.g., Rodney Smolla, *Law of Defamation* § 9:85 (2d ed. 2004); Michael Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers*, 34 Ind. L. Rev. 295, 308-311, 324-330 (2001); 43A C.J.S. *Injunctions* § 255 (2004); W.E. Shipley, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715 (1956). Throughout American history, this Court has held that damages, not injunctions, are the appropriate remedy in defamation actions. *See, e.g., Francis v. Flinn,* 118 U.S. 385, 389 (1886); *Near v. Minnesota,* 283 U.S. at 718-19; *Pennekamp v. Florida*, 328 U.S. 33, 346-471 (1946).

Especially, as here, when the defamation plaintiff is a public figure or a public official, injunctive relief should not be a remedy because of the importance of speech about public individuals who hold such prominent positions in American society. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967). As this Court repeatedly has observed, such individuals have exposed themselves to criticism by voluntarily stepping into the limelight and gaining special access to the media to respond to any attacks. *See, e.g., Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 337 (1974). The injunction in this case is unprecedented in preventing any speech about a major national public figure on an issue of great social importance: the performance of lawyers and courts.

Third, the Court of Appeal erred in concluding that a permanent injunction of speech need not be narrowly tailored (JA 57-58) and in upholding an extremely broad prior restraint that prevents *all* future speech by Tory and Craft about Cochran or his law firm in any public forum. The injunction is not limited to enjoining defamatory

speech. Under its terms, Tory and Craft cannot express their opinions or even make factually true statements about Cochran or his firm. Under the injunction, which prevents all speech in any public forum, Tory or Craft could not walk down a sidewalk or through a park and have a conversation with anyone about Cochran, even if they were praising him. *See Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (parks and streets are public forums). The injunction's tremendous overbreadth is reflected in its restrictions on Craft's speech, though she was not even a party to the litigation.

Nor is this just a matter of how the injunction is phrased. If the injunction were to prevent only the repetition of specific statements, it would serve no purpose because the speaker could find countless other ways of expressing the same idea without violating the court's order. If the injunction prohibits all speech by the defendant about the plaintiff, such as the injunction in this case, it is vastly overbroad in forbidding expression protected by the First Amendment.

The stakes here are enormous. The California Court of Appeal's approach would allow every court in the country, in every defamation action, to issue a broad injunction as a remedy. Any act of defamation would mean that the speaker could be barred forever from saying anything – fact or opinion, true or false – about the defendant in any public forum. A newspaper that was found to have defamed a person could be perpetually enjoined from ever publishing anything about that individual. Such a permanent forfeiture of speech rights, especially about public figures and matters of public concern – which is exactly what occurred in this case – has no place in a country governed under the First Amendment. Affirming the Court

of Appeal's decision and relaxing the centuries old ban on prior restraints in defamation cases would lead to prior restraints being frequently, and likely regularly, imposed in defamation actions.

This Court should reaffirm the basic principles announced in *Near v. Minnesota*: injunctions are prior restraints and are not a permissible remedy in defamation cases.

ARGUMENT

I. THE TRIAL COURT PERMANENTLY ENJOINED SPEECH ABOUT A PUBLIC FIGURE INVOLVING A MATTER OF PUBLIC CONCERN.

This Court long has emphasized the importance of robust debate about those who hold public office and positions of great public prominence. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) ("The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person.") This Court has explained that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures." *Gertz*, 418 U.S. at 342.

Under this definition, Johnnie Cochran is a quintessential public figure; he is likely the best known and perhaps the most controversial attorney in the world. In his recent autobiography, Cochran stated that his success has "provided [him] with the kind of high-profile celebrity and visibility few attorneys have ever enjoyed." Johnnie Cochran, *A Lawyer's Life* 7-8 (2003). Indeed, Cochran's description of himself shows that he is the classic public figure: "Court TV hired me to cohost a nightly TV show. Characters in movies made reference to me. . . . I appeared as myself in the Robert DeNiro/Eddie Murphy film *Showtime*. I appeared often as a guest on shows ranging from the very serious *Nightline* to Larry King's show to sitcoms like *The Hughleys*. *Saturday Night Live* and *Seinfeld* parodied me." *Id.* As the *Los Angeles Times* noted in a 2002 interview, "his face and name are known everywhere there is CNN. He may be the first private citizen in history to have such a huge worldwide recognition factor." Benjamin Levine, *A Cause Celebre*, L.A. Times, Sept. 29, 2002, at Part 5, Page 1. The website for his law firm, "The Cochran Firm: America's Law Firm," describes itself as "one of America's largest personal injury plaintiff law firms." (http://www.cochranfirm.com (last visited, Nov. 4, 2004)). As the Court of Appeal observed, Cochran "willingly concedes" his status as a public figure. (JA 60.)

The trial court's order is simply unprecedented in permanently enjoining Petitioners Tory and Craft from ever saying anything about a major national public figure in any public forum ever again. Moreover, the injunction is antithetical to the First Amendment's commitment to debate about important issues of public concern. The speech restrained in this case was not idle gossip about a

celebrity; it was about the practice of law and the operation of the legal system. This Court has recognized that there is an "extremely important" public interest concerning the conduct of lawyers. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982); *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 793 (1975) (citation omitted) ("lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'") Those who have been involved in the legal system must be encouraged to speak to inform the press and the public of their experiences, including how they were treated by lawyers and judges.

This Court has recognized that "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (citations omitted). All of the speech that gave rise to this lawsuit expressed Tory's opinions about Cochran's conduct as a lawyer and how Tory was treated by the legal system. (JA 53-54.) The permanent injunction upheld by the California Court of Appeal thus has the effect of forever silencing speech – critical or praising, fact or opinion – about the performance of a lawyer who holds a prominent position in the American legal system and American culture.

II. COURT ORDERS PERMANENTLY ENJOINING SPEECH ARE PRIOR RESTRAINTS.

Astoundingly, the California Court of Appeal held that a permanent injunction on speech is not a prior restraint. (JA 56-57.) The Court of Appeal said that the very broad permanent injunction on Tory's and Craft's future speech was not a prior restraint because there was an adjudication that some of Tory's prior speech was unprotected. (*Id.*) The Court of Appeal's conclusion cannot be reconciled with this Court's decisions that clearly and unequivocally hold that a court order permanently enjoining speech is a prior restraint, even if it follows a judicial proceeding. Nor can the Court of Appeal's conclusion that there is no prior restraint be reconciled with the fact that the permanent injunction allows Tory and Craft to speak about Cochran or his law firm only if they first get the Superior Court judge's permission. (JA 34.)

This Court has expressly declared that "permanent injunctions . . . that actually forbid speech activities are classic examples of prior restraints" because they impose a "true restraint on future speech." *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see also id.* at 572 (Kennedy, J., dissenting) (the prior restraint doctrine "encompasses injunctive systems which threaten or bar future speech based on some past infraction.") In *Alexander*, the Court discussed three prior decisions of this Court holding that permanent injunctions on speech are inconsistent with the First and Fourteenth Amendments to the United States Constitution. *Id.* at 550. These cases clearly hold that a permanent injunction on speech, such as the injunction in this case, is a prior restraint.

The seminal case concerning prior restraints is *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In *Near*, a newspaper appealed from a permanent injunction issued after a case "came on for trial." *Id.* at 705-06. The injunction in that case "perpetually" prevented the defendants from publishing again because, in the preceding trial, the lower court determined that the defendant's newspaper was "'chiefly devoted to malicious, scandalous and defamatory articles.'" *Id.* at 706. As the Court in *Alexander* explained, "*Near*, therefore, involved a true restraint on future speech – a permanent injunction." *Alexander*, 509 U.S. at 550. The *Near* Court held that such an injunction on future speech, even if preceded by the publication of defamatory material, was unconstitutional. 283 U.S. at 721.

The Court in *Alexander* also discussed *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), in which a group of picketers and pamphleteers were enjoined from protesting a real estate developer's business practices. *Alexander*, 509 U.S. at 550. Although this Court noted that the injunction in *Keefe* was labeled "temporary" by the trial court, it was treated as permanent since its label was "little more than a formality," it had been in effect for years, it had been issued after an "adversary hearing," and it "already had [a] marked impact on petitioners' First Amendment rights." *Keefe*, 402 U.S. at 417-18 & n.1. This Court struck down the injunction in *Keefe* as "an impermissible restraint on First Amendment rights." *Id.* at 418. In words that are particularly apt for this case, this Court held that the "claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." *Id.* at 418-419. The Court stressed that "[n]o prior decisions support the claim that the interest of an individual in being free

from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Id.*

In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), the third permanent injunction case cited in *Alexander*, this Court invalidated a Texas statute that authorized courts, upon a showing that the defendant had shown some obscene films in the past, to issue an injunction of indefinite duration prohibiting the defendant from showing any films in the future even if those films had not yet been found to be obscene. *Vance*, 445 U.S. at 311. The three-judge District Court in *Vance*, whose decision was affirmed by this Court, held that, as in *Near*, "the state 'made the mistake of prohibiting future conduct after a finding of undesirable present conduct,'" and that such a "general prohibition would operate as a prior restraint on unnamed motion pictures" in violation of the First Amendment. *Vance*, 445 U.S. at 311-12 & n.3, 316-17 (quoting *Universal Amusement Co. v. Vance*, 404 F. Supp. 33, 44 (S.D. Tex. 1975)).

Injunctions are treated as prior restraints because that is exactly what they are: a prohibition of future expression. As this Court noted, injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994). Justice Scalia's opinion in *Madsen*, which was joined by Justice Thomas and Justice Kennedy, explained that "an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint." *Id.* at 797 (Scalia, J., concurring in judgment in part and dissenting in part). Injunctions may be used to "suppress the ideas in question rather than to achieve any other proper governmental

aim." *Id.* at 792-93. Injunctions are "the product of individual judges rather than of legislatures – and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman." *Id.* at 793. As Justice Scalia cautioned, "the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards." *Id.* Violations of an injunction, even an unconstitutional injunction, are punishable by contempt, while violations of unconstitutional laws never can be punished. *Walker v. City of Birmingham,* 388 U.S. 307, 320-321 (1967) (upholding collateral bar rule precluding those violating an injunction from later challenging its constitutionality).

The California Court of Appeal incorrectly concluded that a permanent injunction is not a prior restraint if it follows a trial. (JA 56-57.) But *Near, Keefe,* and *Vance* establish that even though a permanent injunction follows a trial, it is still unquestionably a prior restraint on speech. The permanent injunction in this case, by its very terms, prevents *future* speech. It is not limited to preventing repetition of false statements of fact that are of and concerning the plaintiff and uttered with actual malice – defamatory speech beyond the reach of the First Amendment; the injunction prevents *any* future statement by Tory or Craft about Cochran. Under the terms of the court's order, Tory and Craft can speak about Cochran and his law firm only if they first go to the Superior Court and receive its permission through a modification of the court order. (JA 34.) As in *Near, Keefe*, and *Vance*, this unquestionably makes the permanent injunction a prior restraint.

III. A COURT ORDER PERMANENTLY ENJOINING SPEECH IS NOT A PERMISSIBLE REMEDY IN A DEFAMATION CASE, PARTICULARLY WHEN THE PLAINTIFF IS A PUBLIC FIGURE.

Prior restraints on speech constitute "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Thus, the First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." *Id.* at 589. There is a "deeply-seated American hostility to prior restraints." *Id.* This Court has stressed that "'[*a*]*ny* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *Vance,* 445 U.S. at 317 (emphasis in original, quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). This Court has often repeated, in many distinct contexts, its antipathy towards "systems" of prior restraints on speech.[4] "It is because of the personal nature"

[4] *See, e.g., CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., Circuit Justice) (finding temporary injunction on broadcast unconstitutional despite allegations that broadcast would be defamatory and cause economic harm); *Nebraska Press Ass'n,*, 427 U.S. at 556 (applying prior restraint doctrine to reject gag order on participants in a criminal trial); *New York Times Co. v. United States*, 403 U.S. 714 (1971) (*per curiam* opinion applying prior restraint doctrine to strike down injunction on publication of confidential government documents, and, in separate opinions, "every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraints as presumptively unconstitutional," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting)); *Bantam Books*, 372 U.S. at 70-71 (listing cases striking down prior restraints and rejecting as "informal censorship" local commission's ability to list certain publications as "objectionable" and to threaten prosecution for their sale); *Near,* 283 U.S. at 706, 722-23 (rejecting injunction on future publication of newspaper despite

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of the right of free speech that this Court has "rejected all manner of prior restraint on publication, despite strong arguments that if the material was unprotected the time of suppression was immaterial." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967) (plurality opinion) (citation omitted).

The strong presumption against prior restraints is evidenced by the fact that this Court never has upheld a prior restraint as a permissible remedy in a defamation action. The absence of a single Supreme Court decision approving a prior restraint as a remedy in a defamation case reflects the historical condemnation of injunctions in such actions, the inherent adequacy of money damages, and the inevitable futility of crafting an injunction that is both effective and narrowly tailored. Moreover, injunctions especially should never be allowed when the plaintiff is a public official or public figure because of the indisputable importance of social discussion about these individuals and because such individuals generally have other remedies, such as access to the media to respond to any attacks on their reputation.

publisher's previous dissemination of defamatory material). *See also Madsen,* 512 U.S. at 798 (Scalia, J., concurring in judgment in part and dissenting in part) (listing cases and observing that this Court has "repeatedly struck down speech-restricting injunctions"); *Avis Rent A Car Sys., Inc. v. Aguilar*, 529 U.S. 1138, 1140 (2000) (Thomas, J., dissenting from denial of certiorari) (urging granting of certiorari to "address the troubling First Amendment issues raised" by an injunction imposing "liability to the utterance of words in the workplace").

A. Prior Restraints Are Not A Constitutionally Permissible Remedy In Defamation Cases.

1. Permanent Injunctions Historically Have Not Been A Permissible Remedy in Defamation Actions.

The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation. *See* Rodney Smolla, *Law of Defamation* § 9:85 (2d ed. 2004); Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers*, 34 Ind. L. Rev. 295, 308-311, 324-330 (2001); 43A C.J.S. *Injunctions* § 255 (2004); W.E. Shipley, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 715-16 (1956).

The rule was established in Eighteenth-Century England, well before the American revolution. Its earliest statement is found in *Roach v. Garvan*, 26 Eng. Rep. 683 (Ch. 1742), where Lord Chancellor Hardwicke remarked in a case involving a newspaper that printed commentary that was both libelous and a contempt of court:

> Mr. Solicitor General has put it upon the right footing, that notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it: For whether it is a libel against the public or private persons, the only method is to proceed at law.

Three-quarters of a century later, Thomas Howell, barrister and editor of the *State Trials* series, tellingly explained the strong consensus that equity had no power to restrain defamation: "I believe there is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such doctrine can be

deduced, either directly or by inference or analogy." 20 Thomas B. Howell, *A Complete Collection of State Trials* 799 (1816).

Nineteenth and Twentieth Century American courts, with remarkable uniformity, adopted the traditional English rule. Shipley, *supra*, at 716-21. *See, e.g.*, *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173, 176, 179-80 (1876); *Balliet v. Cassidy*, 104 F. 704, 706 (C.C.D.Or. 1900); *Howell v. Bee Publ'g Co.*, 158 N.W. 358, 359 (Neb. 1916); *Willing v. Mazzocone*, 393 A.2d 1155, 1157-58 (Pa. 1978); *Meyerson*, *supra*, at 324-330. Free speech concerns were prominent among the reasons given for their position. In the very first American case on the subject, New York's Chancellor Walworth began his opinion refusing to enjoin the publication of a libelous pamphlet by saying:

> It is very evident that this court cannot assume jurisdiction of the case . . . or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government.

Brandreth v. Lance, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839).

In 1882, the Louisiana Supreme Court issued an elaborate opinion refusing to enjoin a newspaper from printing libelous cartoons. After discussing the constitutional prohibition of prior restraints, the court depicted the traditional common law rule as central to preventing a legal regime in which "with a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed."

State ex rel. Liversey v. Judge of Civil Dist. Court, 34 La. Ann. 741, 745 (1882).

In 1909, a United States Circuit Court interpreted the Alabama Constitution as prohibiting equity from restraining defamation, saying:

> The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the courts were allowed to take the alleged slanderer or libeler by the throat, in advance.

Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 F. 553, 556 (C.C.M.D. Ala. 1909).

The traditional rule that equity does not enjoin defamation is reflected in the briefs submitted to this Court in *Near v. Minnesota*, 283 U.S. 697 (1931). Near argued that "[t]he general rule is that equity will not under any circumstances enjoin defamation as such." Appellant's Brief, *Near*, 1930 WL 28681 (page numbers not available). In supporting this proposition, Near cited three treatises and discussed over twenty cases directly supporting his claim. *Id.* The State, in arguing that "[t]he court has power to restrain by injunction publication of defamatory matter," relied on just two far less apposite cases. Brief of Appellee, *Near*, 1931 WL 30640, at *10. This Court's holding in *Near* was in line with centuries of English and American decisions. The Court explained that the injunction of speech in *Near* – like the injunction issued in this case – was an "unusual, if not unique" imposition on the freedom of speech. *Near*, 283 U.S. at 707.

2. Damages Are A Sufficient Remedy For Plaintiffs In Defamation Cases.

Justice Scalia observed that "[p]unishing unlawful action by judicial abridgment of First Amendment rights is an interesting concept; perhaps Eighth Amendment rights could be next. I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct." *Madsen*, 512 U.S. at 794 n.1 (Scalia, J., concurring in judgment in part and dissenting in part). *See also Aguilar*, 529 U.S. at 1143 (Thomas, J., dissenting from denial of certiorari) ("money damages" for future use of unprotected language in the workplace is preferable to an injunction on the same words).

Justice Scalia's observation is based on a wealth of support in the annals of jurisprudence, particularly in the pages of *Near*, where this Court *already* has announced that damages and other methods of punishing past speech – not restraints on future speech – are the appropriate remedies in defamation cases. In *Near*, this Court drew a line between damages as a permissible remedy for past speech and an impermissible system that proscribes future speech: "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals." *Near*, 283 U.S. at 718-19.

Courts long have recognized that damages, not injunctions, are the appropriate remedy in a defamation action. In the first days of the Republic, even before the adoption of the First Amendment, the court in *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319 (1788), explained that although "libelling

[*sic*] is a great crime," it is well-understood that "any attempt to fetter the press" is unacceptable. *Id.* at 324-25. Even though the defendant's "offence [*sic*] [was] great and persisted in," the Court did not enjoin the defendant's future speech. *Id.* at 328.

Similarly, well over a century ago, in *Francis v. Flinn,* 118 U.S. 385 (1886), this Court stressed that damages, not injunctions, are the proper remedy in defamation actions. In expressing the general rule that equitable relief is not permissible when there are remedies at law, the Court stated: "If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity can interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation belonging to courts of law." *Id.* at 389.

In other cases, too, this Court has recognized that damages, not injunctions, are the appropriate remedy in defamation cases. For example, in *Pennekamp v. Florida,* 328 U.S. 331 (1946), this Court reversed a judgment of contempt against a newspaper editor responsible for publishing editorials that purportedly were contemptuous of judges and the administration of criminal justice in pending cases. *Id.* at 350. The Supreme Court of Florida, upholding the lower court's citation for contempt, explained that a newspaper may generally criticize a judge, but "'may not publish scurrilous or libelous criticisms of a presiding judge as such or his judgments for the purpose of discrediting the Court in the eyes of the public.'" *Id.* at 343 n.6. Nevertheless, this Court concluded that the contempt citation must be reversed to encourage debate on public issues, and also because, "when the statements [about a judge] amount to defamation, a judge has such a remedy

in damages for libel as do other public servants." *Id.* at 348-49.

Precluding prior restraints does not leave those defamed without remedy, or render the law powerless to deter defamation. This Court has upheld, with crucial limitations, the ability of public officials and public figures to recover damages in defamation cases. *Sullivan,* 376 U.S. at 283. The *Sullivan* Court stressed that damage awards, even against major metropolitan newspapers, are a potent weapon for the defamation plaintiff and noted that "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277-78.

Despite these cautionary observations about the potential impact of damage awards, damages remain an available remedy in defamation cases if the First Amendment's requirements are met. In this case, the injunction was issued despite the fact that no damages were awarded because the plaintiff, Johnnie Cochran, waived his right to seek damages and conceded at trial that he could show no special damages. (RT 55:20-28.) The Superior Court found that Cochran never proved the "existence and amount of damages." (JA 37-38.) In such a situation, there is hardly the irreparable injury warranting equitable relief.[5]

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[5] An opinion from the Supreme Court of Pennsylvania, with facts remarkably similar to those at bar, persuasively reasoned that damages are the sole remedy available to plaintiffs in defamation actions. *Willing v. Mazzocone,* 393 A.2d 1155, 1156-58 (Pa. 1978). In *Willing,* the Court struck down as unconstitutional an injunction preventing an individual from picketing her former lawyers (claiming that the lawyers "stole" her money and "sold her out"), even though the former client was demanding the repayment of money that she clearly was not owed. *Id.*

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Monetary damages are the appropriate remedy in a defamation action. Injunctions, such as that issued in this case, should not be permitted.

3. Effective Injunctions In Defamation Cases Are Inherently Overbroad and Inevitably Put Courts In The Role of Being Perpetual Censors Determining Whether Speech Can Occur.

Injunctions have not been, and should not be permitted in defamation cases for another reason: it is impossible to formulate an effective injunction that would not be extremely overbroad and that would not place the court in the role of the censor, continually deciding what speech is allowed and what is prohibited. Any *effective* injunction will be overbroad, and any *limited* injunction will be ineffective.

Prior restraints, such as injunctions, are a "'most extraordinary remed[y]'" to be used "only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive means." *CBS*, 510 U.S. at 1317 (Blackmun, J., Circuit Justice). There can be no constitutional justification for such an extreme remedy unless it can be properly tailored and would actually serve its purpose. An injunction "issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President*

The *Willing* Court also soundly rejected the contention that injunctive relief was the only adequate remedy because the picketing former client could not afford to pay a money judgment, and thus, practically, there was not an adequate remedy at law. *Id.* at 1158.

and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968). Moreover, this Court has acknowledged that it "must also assess the probable efficacy of [a] prior restraint of publication as a workable method," and "cannot ignore the reality of the problems of managing" such orders. *Nebraska Press*, 427 U.S. at 565. As the axiom goes, "a court of equity will not do a useless thing." *New York Times*, 403 U.S. at 744 (Marshall, J., concurring).

In defamation cases, the injunction either must be limited to the exact communication already found to be defamatory, or reach more broadly and restrain speech that no jury has ever determined to be libelous. Most egregiously, as in the present case, the injunction can go so far as to prevent any future speech about the plaintiff. An injunction that is limited to preventing repetition of the specific statements already found to be defamatory is useless because a defendant can avoid its restrictions by making the same point using different words without violating the court's order.

Moreover, even if the injunction is limited to particular statements already found false, defamatory, and uttered with the requisite mental state, a prospective prohibition on the same comments cannot guarantee satisfaction of the elements of defamation at every point in the future. A statement that was once false may become true later in time. Likewise, even if a defendant in a defamation action once acted with the requisite degree of culpability, he or she may have a different mental state later. Defamatory statements about public figures are outside the scope of the First Amendment only when the plaintiff can "prove *both* that the statement was false and that the statement was made with the requisite level of culpability." *Hustler Magazine*, 485 U.S. at 52 (emphasis

in original). Permitting permanent injunctive relief in a defamation case absolves the defamation plaintiff of his or her burden to demonstrate falsity and culpability each time a purportedly defamatory statement is made. Thus, unlike injunctions on particular obscene motion pictures, enjoining "defamatory" speech will inherently reach too far and be overbroad because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

An injunction that reaches more broadly than the exact words already held to be libelous is overbroad for the very reason that it restrains communication before a jury determination of whether it is or is not protected by the First Amendment. Because it delays communication that may be non-defamatory and protected by the First Amendment, it is the essence of a prior restraint.

Just as it is "always difficult to know in advance what an individual will say," *Southeastern Promotions*, 420 U.S. at 559, it is also difficult to know in advance *who* will speak. Any injunction designed to restrict speech effectively must encompass others besides the defamation defendant, such as Ruth Craft in this case. But that inevitably involves stripping persons not before the court of their First Amendment rights without sufficient due process. *See Hansbury v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (non-parties cannot be bound by judgments). On the other hand, even the most

over-reaching injunction on defamatory statements will also be under-inclusive, and therefore ineffective, since a third party, completely unaffiliated with the defendant and not bound by the injunction, can – at his financial peril – repeat the same statements already determined to be defamatory. *See Nebraska Press*, 427 U.S. at 609 n.36 (Brennan J., concurring) (lamenting the futility of under-inclusive injunctions on speech).

In addition, an injunction that reaches more broadly than the exact communication already held to be defamatory has the effect of forcing a defendant to go to court any time he or she wants to say anything about the plaintiff and prove to the court that the intended statement is not defamatory. This is exactly the nature of the injunction in this case: it prohibits Tory, and even Craft who was not a party to the litigation, from saying anything about Cochran in any public forum until and unless they go back to the court and obtain the judge's permission to speak. That brand of judicial clearance is what this Court in *Near* called "the essence of censorship." 283 U.S. at 713.

In *Near*, this Court emphatically rejected the notion that even one who had previously been found liable for printing defamatory matter could be forced to prove to a judge that future statements "are true and are published with good motives and for justifiable ends." *Near*, 283 U.S. at 713. The injunction in this case, as in any defamation case, is precisely that type of censorship, as those enjoined will not be able to say anything about the subject without first getting permission from a judge. Such restrictions inevitably put the court in the classic role of the censor and are intolerable under the First Amendment.

4. Allowing Injunctions As A Remedy In Defamation Cases Would Be A Radical Change In The Law With A Devastating Effect On Freedom Of Speech.

In 1931, this Court noted that, "for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints on publication relating to the malfeasance of public officers;" the Court thus reaffirmed the "deep-seated conviction that such restraints would violate constitutional right." *Near*, 283 U.S. at 718. The same certainly holds true today almost three-quarters of a century later. This Court has never, in all of American history, even once upheld a prior restraint in the defamation context. This Court has sanctioned injunctions on speech only in the most "exceptional cases," such as those involving obscenity, incitements to violence and "the publication of the sailing dates of transports or the number and location of troops." *Near*, 283 U.S. at 716. *See also Nebraska Press*, 427 U.S. at 590-91 (Brennan, J., concurring) (explaining that this Court has limited injunctions on speech only to these "three such possible exceptional circumstances").

The few scenarios where this Court has even contemplated prior restraints are readily distinguishable from any case involving defamation. For example, in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), this Court explained that injunctions on materials already deemed obscene are "glaringly different" from the injunction of a publication "because its past issues had been found offensive." *Id.* at 445. Reiterating *Near*'s admonition that the latter type of injunctions are the "'essence of censorship,'" the *Kingsley* Court "studiously withh[eld] restraint upon matters not already published and not yet found offensive."

Id. In this case, by contrast, the court has enjoined Tory and Craft from saying anything about Cochran, and thus has restrained speech that has not yet been "published and not yet found offensive."

Similarly, even *Near*'s allowance for injunctions on national security grounds was greatly circumscribed in the "Pentagon Papers" case, *New York Times v. United States*, 403 U.S. 713 (1971), where this Court emphasized that the government failed to meet the very heavy burden needed to sustain a court order enjoining speech.

In *Pittsburgh Press*, this Court upheld a "narrowly drawn" rule prohibiting the "placement in sex-designated columns of advertisements for nonexempt job opportunities." 413 U.S. 376, at 391. The Court invoked *Near* and "reaffirm[ed] unequivocally the protection afforded to editorial judgment and to the free expression of views . . . however controversial." *Id.* Furthermore, in *Pittsburgh Press*, the Court stressed that the Commission's order preventing sex-based want ads could not be enforced by contempt sanctions because "[t]he Commission is without power to punish summarily for contempt." *Id.* at 390 n.14. That is very different from a court order enjoining speech, such as in this case, where any violations are punishable by contempt.

Consistent with the presumptive invalidity of all systems of prior restraints, most jurisdictions adhere to the maxim that "equity will not enjoin a libel."[6] Smolla,

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[6] *See, e.g., Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 239 F.3d 172, 177-78 (2d Cir. 2001); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C.Cir. 1987); *In re Providence Journal Co.*, 820 F.2d 1342, 1345-46 (1st Cir. 1986); *United States v. Doe*, 455 F.2d 753, 760 n.4 (1st

(Continued on following page)

supra, at §9.85 at 9-56. Unfortunately, several jurisdictions already have departed from the sound reasoning in *Near*.[7] This trend must end with a decisive rejection of permanent injunctions in the defamation context, or else "the constitutional limits of free expression in the Nation [will] vary with state lines," *Pennekamp,* 328 U.S. at 335, and "judges at all levels" will be interjected "into censorship roles that are simply inappropriate and impermissible under the First Amendment." *Nebraska Press*, 427 U.S. at 607 (Brennan, J., concurring). Such a result would be an unacceptable and unprecedented abridgment of the First Amendment.

Cir. 1972); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963); *American Malting Co. v. Keitel*, 209 F. 351, 354-56 (2d Cir. 1913); *Robert E. Hicks Corp. v. Nat'l Salesmen's Training Ass'n*, 19 F.2d 963, 964 (7th Cir. 1927); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983); *Willing v. Mazzocone*, 393 A.2d 1155, 1157-58 (Pa. 1978); *Greenberg v. Burglass*, 229 So.2d 83, 86-89 (La. 1969); *Mescalero Apache Tribe v. Allen*, 469 P.2d 710, 711 (N.M. 1970); *Schmoldt v. Oakley*, 390 P.2d 882, 884-87 (Okla. 1964); *Prucha v. Weiss*, 197 A.2d 253, 256 (Md. 1964); *Kwass v. Kersey*, 81 S.E.2d 237, 243-46 (W.V. 1954); *Moore v. City Dry Cleaners & Laundry, Inc.*, 41 So.2d 865, 873 (Fla. 1949); *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees*, 79 N.E.2d 46, 48-50 (Ill. 1948); *Marlin Fire Arms Co. v. Shields*, 64 N.E. 163, 165-67, 171 N.Y. 384, 391-96 (N.Y. 1902); *Beck v. Ry. Teamsters' Protective Union*, 77 N.W. 13, 24 (Mich. 1898).

[7] *See, e.g., San Antonio Cmty. Hosp. v. Calif. Dist. Council of Carpenters*, 125 F.3d 1230, 1237 (9th Cir. 1997); *Brown v. Petrolite Corp.*, 965 F.2d 38, 50-51 (5th Cir. 1992); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206-09 (6th Cir. 1990); *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*, 352 N.W.2d 1, 11 (Minn. 1984); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62-63 (Ga. 1975); *O'Brien v. Univ. Comty. Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975); *Guion v. Terra Mktg. of Nevada, Inc.*, 523 P.2d 847, 848 (Nev. 1974); *Carter v. Knapp Motor Co.*, 11 So.2d 383, 385 (Ala. 1943); *Menard v. Houle*, 11 N.E.2d 436, 437 (Mass. 1937).

B. At A Minimum, Injunctive Relief Should Not Be Available To Public Figure Plaintiffs In Defamation Cases.

The only way to adequately safeguard free expression is to mandate that no kind of civil defamation plaintiff may obtain injunctive relief, but the point takes on an added urgency where, as here, the plaintiff is a public official or a public figure. Public figures "are less vulnerable to injury from defamatory statements because of their ability to resort to effective 'self-help' "; they "usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979). There is no indication that Cochran resorted to "self-help" by publicly countering Tory's criticisms; nor any indication that Cochran suffered real injury since Cochran waived his right to seek money damages and conceded at trial that he had no evidence Tory's activities caused him to lose any business. (RT 2:7-10, 55:20-28.)

"[M]ore importantly," this Court has held that "public figures are less deserving of protection than private persons because public figures, like public officials, have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.' " *Wolston*, 443 U.S. at 164. Put simply, even if private individuals were entitled to injunctive relief in defamation cases, the purposes and history of the First Amendment and prior restraint jurisprudence do not support the notion that public figures should be able to enjoy the benefits of such a remedy.

This Court has recognized the importance of speech about public figures, especially those, such as Johnnie

Cochran, who play such an important role in the American legal system. As Chief Justice Earl Warren observed in words that are particularly apt for this case:

> [I]t is plain that although they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

Butts, 388 U.S. at 164 (Warren, C.J., concurring); *see also Milkovich v. Lorain Journal*, 497 U.S. 1, 15 (1990) (quoting Chief Justice Warren's concurring opinion in *Butts*). Public figures, such as Johnnie Cochran, must accept that a consequence of their celebrity – here plainly sought and embraced – is that they may be subjected to "vehement, caustic, and sometimes unpleasantly sharp attacks." *Sullivan*, 376 U.S. at 270. This is an inherent consequence of the First Amendment because "freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (198[illegible] This is especially important here where the criticism was targeted not just at Cochran, but also at lawyers and the legal profession, subject matter about which robust debate should be encouraged.

Even if, under some limited circumstance, injunctions on future speech about private persons could be considered consistent with the First Amendment – which Petitioners dispute – the paramount importance of an open and free discourse regarding public persons imposes a constitutional bar on their ability to obtain injunctive relief in the defamation context.

IV. ANY PERMISSIBLE PRIOR RESTRAINT MUST BE NARROWLY TAILORED, BUT THE PERMANENT INJUNCTION IN THIS CASE IS EXTREMELY BROAD.

A. If A Prior Restraint Is Ever Permissible, It Must Be Narrowly Tailored.

Consistent with this Court's abhorrence of prior restraints, it has ruled that any injunction restricting speech must "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765. Put another way, an injunction on speech "must be couched in the narrowest terms that will accomplish the pin-pointed objective" of the injunction. *Carroll*, 393 U.S. at 183.

The Court of Appeal upheld the permanent injunction in this case based on its expressed premise that the overbreadth doctrine does not apply to permanent injunctions. (JA 56-57.) This is plainly wrong. This Court has made clear that *any* restriction of speech is unconstitutional if it regulates substantially more speech than the

Constitution allows to be regulated. *See, e.g., NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"). *See also Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (invalidating overbroad regulations prohibiting all "First Amendment activities" at airports in Los Angeles); *Houston v. Hill*, 482 U.S. 451, 481 (1987) (declaring unconstitutional an overbroad provision making it unlawful to interrupt police officers in the course of their duties); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 61-2 (1981) (striking as overbroad an ordinance prohibiting all live entertainment); *Gooding v. Wilson*, 405 U.S. 518 (1972) (invalidating a fighting words statute). If they are permitted at all, prior restraints in defamation actions brought by public figures must be narrowly tailored and be limited to defamatory statements outside the scope of First Amendment protection: false statements of fact uttered with actual malice.[8]

[8] Given these constitutional principles, lower courts consistently reject overbroad permanent injunctions on speech. *See, e.g., CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 461-63 (4th Cir. 2000); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 375 (Mo. 2003). For instance, in *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), the Second Circuit struck down a permanent injunction, issued after a defamation trial, prohibiting "any" report or statement about a businessman or his brother. The court determined that the injunction was an unconstitutional prior restraint, but further observed that the injunction was defective because it precluded "any" remarks, and was not, at a minimum, "directed solely to defamatory reports, comments or statements." *Id.* at 485.

B. The Prior Restraint Imposed On Tory and Craft Is Unconstitutionally Overbroad.

The prior restraint entered by the trial court and affirmed by the Court of Appeal is breathtaking in its scope and sweep; it is the antithesis of a narrowly drawn order preventing speech.

First, the injunction is not limited to enjoining defamatory expression. In many ways, it extends far beyond restricting defamatory speech because:

- It prohibits Tory and Craft from making any statement about Cochran or his law firm, even if they are just expressing opinion. Opinion, even if unflattering, is, of course, protected by the First Amendment and cannot be deemed defamatory. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Gertz*, 418 U.S. at 339 ("The First Amendment recognizes no such thing as a 'false' idea.")[9]

- In addition to preventing Tory and Craft from opining about Cochran, the injunction also prohibits other forms of protected speech. For example, it prohibits speech that otherwise would be protected by the litigation privilege concerning pending cases. *See, e.g.*, Cal. C. Civ. Proc. §47(b) (defining California's litigation privilege).

- The injunction is also not limited to preventing false statements of fact that would be injurious to Cochran's

[9] In fact, the statements which gave rise to this lawsuit were expressions of opinion and were not defamatory at all. Many of the signs were not directed at Cochran, such as "What can I do if I don't receive the Justice the Constitution guarantees me." The ones that mentioned Cochran were just expressing opinion, such as "Attorney Cochran, Don't We Deserve at Least the same Justice as O.J." and "Unless You have O.J.'s Millions – You'll be Screwed if you USE J.L. Cochran, Esq."

reputation. Under the terms of the injunction, even speech praising Cochran is prohibited. Completely true factual statements about Cochran also are enjoined.

• The injunction continues forever, even if Johnnie Cochran dies or his law firm dissolves. The law, of course, does not recognize defamation claims for those who are deceased. *See, e.g., Gruschus v. Curtis Publ'g Co.*, 342 F.2d 775, 776 (10th Cir. 1965). But for the rest of their lives, Tory and Craft never can utter a word about Cochran or his law firm.

Second, the injunction is vastly overbroad in that it applies to speech in *any* "public forum." The Petitioners could not walk down a sidewalk or through a park and say anything to anyone about Johnnie Cochran. *See, e.g., Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (affirming that parks and streets are public forums). For example, Tory and Craft seemingly would violate the injunction, and be subject to punishment for contempt, if either walked down a sidewalk or through a public park, and said to a friend, "I think Johnnie Cochran did a good job in representing O.J. Simpson," or "I saw Cochran being interviewed on television."

Third, the startling overbreadth of the injunction is most clearly manifest in its application to Ruth Craft and Tory's other "agents" and "representatives." Craft never was named as a defendant in the underlying lawsuit, she never had an opportunity to defend herself at trial, and yet she is one of only two people in America who may never mention Cochran in public.[10] The wholesale stripping of Craft's First Amendment rights is inconsistent with any notions

[10] In contrast, Cochran's firm never was named as a plaintiff in the lawsuit, yet it is still shielded from critical speech.

of equity or due process. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982) ("'guilt by association alone' . . . is an impermissible basis upon which to deny First Amendment rights"). *See also Martin v. Wilks*, 490 U.S. at 761 (1989), *Hansbury v. Lee*, 311 U.S. at 40 (due process prevents non-parties from being bound by judgments). The permanent injunction is so overwhelming in scope that even this brief violates its terms since it is authored by Tory's "agents" and "representatives," it mentions Cochran, and it is distributed in public fora.

CONCLUSION

This Court has emphasized that the First Amendment protects the rights of the "lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). Correspondingly, affirming the permanent injunction imposed in this case on a lonely picketer would have profound consequences for all speakers, ranging from the pamphleteer to the largest newspapers and television stations.

Abandoning *Near v. Minnesota*'s disapproval of injunctive relief in defamation actions would mean that every court, in every successful defamation case, could enjoin all future speech by the defendant, or its agents, about the plaintiff in any public forum. The richness of the English language and the myriad ways of expressing any thought means that the only effective way to enjoin defamation would be, as here, to keep the defendant from ever uttering another word about the plaintiff. Such a result runs contrary to the fundamental precepts of the First Amendment,

especially where the enjoined speech relates to a public person and a public issue.

The permanent injunction in this case is a broad prior restraint on speech about a public figure, on a matter of public concern, striking at the very heart of the First Amendment's commitment "that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. at 270. This Court should reverse the decision of the California Court of Appeal and should reaffirm centuries of jurisprudence and the holding in *Near v. Minnesota*: permanent injunctions of speech are not a permissible remedy in defamation cases.

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In The

Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District, Division One

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INTRODUCTION

This is not a case about restricting protected **speech**; it is a case about restricting specific individuals from engaging in further unlawful **conduct** that happens to consist primarily of (unprotected) speech, in order to prevent recurrence of extortion attempts those individuals have directed at Respondent, Johnnie L. Cochran, Jr. ("Cochran"). The injunction being challenged (hereinafter the "Injunction") is a properly tailored remedy designed to protect Cochran from the demonstrated intent of Petitioners, Ulysses Tory ("Tory") and Ruth Craft ("Craft") (collectively "Petitioners"), to make what have been irrevocably found to be false, malicious, and privacy-invading statements regarding Cochran's honesty and character, and the quality of his representation of Tory "for the purpose," not of expressing legitimate speech, but of trying to "induce Cochran to pay Tory various amounts of money to which Tory [is] not entitled." (JA 42, *see also*, JA 41-42.)

After a full trial on the merits, the Los Angeles Superior Court made the now-irrefutable finding that Tory defamed Cochran and invaded his privacy. He did this by orchestrating loud and intrusive demonstrations and picket lines outside Cochran's place of business and other places where Cochran appeared. Tory's purpose was not to express any legitimate ideas or opinions, but to "improperly coerce" Cochran to pay Tory "money in tribute for or premium for [Tory's] desisting from" making what the evidence showed were "false and defamatory and privacy-invading communications" intended by Tory to "prevent person(s) from entering Cochran's place of business . . . [by] creating a negatively charged and ominous environment." (JA 42-43.)

Tory specifically refused to cease his unjustified disruption of Cochran's business unless he was either "paid" or "prevented by a judgment or some other process of [the] court" from continuing to interfere with Cochran and Cochran's law practice. (JA 42-43.) Cochran did not pay because he "owe[d] no money whatsoever to Tory" (*Id.*), and he refused to accede to the extortion attempts. The **only** other way to stop Tory from infringing upon Cochran's rights was – by Tory's own admission – to order Tory to stop.

By ordering Tory to cease his unlawful conduct, the Injunction provides relief to Cochran and, at the same time, furthers governmental interests in, among other things: (i) protecting Cochran's property rights; and, (ii) discouraging others from trying to use their expression rights as weapons in schemes like Tory's. Despite the broad (but content-neutral) reach of the Injunction, under the unusual circumstances of this case, it could not be any more narrowly tailored while still serving the interests it is designed to further. Accordingly, the Injunction is not unconstitutional.

STATEMENT OF THE CASE

I. TORY'S "STATEMENT OF THE CASE" IGNORES THE FACTUAL FINDINGS MADE BY THE TRIAL COURT AND IS MISLEADING

In his Brief on the Merits (hereinafter, "MB"), Tory cites to his own testimony at trial regarding the events of the early 1980's that supposedly gave rise to Tory's right to

defame and otherwise damage Cochran until such time as Cochran paid Tory to stop.[1] After the fact, Tory is trying to make his conduct look like peaceful and honest communication of his legitimate opinion. The record is to the contrary, however. For example, Tory's public declaration that Cochran is a "crook, a liar and a thief" (JA 41), because he "offered to," but did not ever, "repay" Tory and Craft monies owed by another lawyer (MB 3), is contradicted by the binding determination made by the trial judge, that "Cochran owes no money whatsoever to Tory." (JA 39.) In fact, "Tory never paid Cochran any money at all for legal services or any other purpose." (JA 39.)[2]

Even more misleading is Tory's representation to this Court that he "picketed with a group of other people who were also dissatisfied with Cochran." (MB 3.) Purported authority for this statement is the testimony in the trial

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[1] As explained under heading "II.A.1." of the Argument Section, *infra*, the purpose of this proceeding is not to re-weigh evidence or reject the factual findings made in the court below. The trial court's factual conclusions, as set forth in the Statement of Decision (JA 36-50), should therefore be accepted as true for purposes of the constitutional analysis here at issue.

[2] Tory's self-serving testimony is also inconsistent with the now-incontrovertible determinations made by the trier of fact, Judge Ronald Sohigian, at trial and after all of the evidence was presented. For example, Tory argues that he and Craft "paid [attorney Earl] Evans ["Evans"] for his services under the impression that they were paying Evans as an agent of Cochran's law firm," and he claims that "Cochran offered to repay" Tory and Craft the money they paid to Evans. (MB at p. 3, citing RT 189:3-7, 253:1-19, 272:14-273:2.) Judge Sohigian found, however, that Tory and Craft knew and recognized that Evans and Cochran were not partners as evidenced by, among other things, the fact that all the checks for legal services rendered for Tory and/or Craft were made payable to Evans, not to Cochran.

transcript (hereinafter, "TT") at page 208, lines 22 through 26. That excerpt reads as follows:

> **"Q. Now, these fellow picketers, they weren't former clients of Mr. Cochran, were they? . . .**
>
> **A. One of them said that he was."**

The reality, then, is that Tory was not engaged in a legitimate public protest along with other dissatisfied former clients of Cochran. In fact, he admitted, "Yes, I bought the picketers lunch." (TT 212:7-9.) Tory even admitted to the "possibility" that he "g[o]t the picketers to join [him] in [his] picketing activity **because** [he] b[ought] them lunch." (TT 214-17 (emphasis added).)

Some of the very testimony cited by Tory to support his contention that his picketing had a legitimate purpose (MB 3) actually illustrates Tory's extortionist motives. At page 216, lines 6 through 12, the transcript reads:

> **"I'm picketing Mr. Cochran because he promised to give me the money that Mr. Evans owed. And the reason why Mr. Cochran promised me is because for me to stop picketing."**

Based on this and other testimony and evidence offered at trial, Judge Ronald Sohigian acceded to Cochran's request that an injunction be issued to protect Cochran from any future efforts by Tory to extract "blood money" from Cochran. Given Tory's predilection for misusing the public forum, the only effective way to provide Cochran with the assurance of peace that he deserved after prevailing at trial was to preclude Tory from discussing Cochran "[i]n any public forum." (JA 34.)

II. THE FINDINGS OF FACT CONTAINED WITHIN THE NOW-BINDING STATEMENT OF DECISION TELL A DIFFERENT STORY THAN THAT TOLD BY TORY

In the interest of fairness and accuracy, the factual background of this dispute – **as found by the trial court** in its Statement of Decision – should be recited:

> This litigation arises out of Tory's repeated unjustified demands for money from Cochran, which began in 1985 when Tory (who had retained Cochran as legal counsel in 1983) unreasonably demanded $10 million dollars. Tory and his putative wife, Craft, also demanded reimbursement of legal fees paid to Evans,[3] a "space-for-services" tenant in Cochran's law suite, even though they must have known that Cochran and Evans were not partners and hence Cochran was not liable for any debt Evans might have owed to Tory and/or Craft. (JA 38-39.)

Although he was a client of Cochran's, Tory never paid Cochran any money for legal services (or, for that matter, for anything else), and Cochran "owes no money whatsoever to Tory." In 1985, Cochran justifiably sought and obtained an order relieving him as counsel for Tory based on the conflict created by Tory's demands for $10 million and other statements made in Tory's 1985 letter to Cochran. Tory

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[3] Evans represented Craft in various family law matters. Evans' representation was not deficient, and the contention of Tory and Craft to the effect that Craft had prevailed in a child custody matter venued in federal court was not supported by the evidence. What actually happened is that Craft lost her case in the state court and then lost again in the federal courts. But after that, her former husband voluntarily turned the children over to her. As such, the fact that Craft ultimately obtained custody of her children is no reflection at all on the quality of legal representation rendered by Evans. (JA 40.)

and Craft made a complaint about Cochran to the State Bar, which took no action because the complaints described by Tory and Craft did not implicate "disciplinary matters." Rather, it appeared that Tory and Craft had a fee dispute with Cochran and/or Evans. No further legal action was taken by Tory and/or Craft against Cochran and/or Evans. (JA 39-40.)

Years after Tory's attorney-client relationship with Cochran ceased, Tory and Craft, along with their agents (acting within the scope of their agency), began regularly picketing Cochran's law office. "The picketing conduct was intentionally targeted at preventing person(s) from entering Cochran's place of business for legal services and creating a negatively charged and ominous environment." Tory and others carried placards containing derogatory and bizarre references to Cochran, such as "Johnnie is a crook, a liar and a thief," and "Johnnie L. Cochran, Esq. Your Piss Is Not Rain." Other "statements were made to the effect that Cochran owed a substantial amount of money to Tory" based on past breaches of contract, that Cochran acted "dishonestly or below the standard of care in prior legal representation of Tory" and that "Cochran [was] a bad character and/or a substandard practitioner of law."[4] After Cochran commenced litigation against Tory based on Tory's conduct, the disruptive activity of Tory and Craft escalated to include (among other things) "loud chanting of obscene statements." (JA 40-43.)

[4] Additional examples of the statements published by Tory as part of his picketing activity are listed at paragraph 1.a.(16) of the Statement of Decision, located at page 41 of the Joint Appendix, and are reprinted in footnote 12, *supra*.

The statements published by Tory as part of his efforts to disrupt Cochran's business "were false when they were made; were made maliciously and with reckless disregard for the truth; and were actually made for the purpose of inducing Cochran to pay Tory various amounts of money to which Tory was not entitled." Tory and Craft (as well as their agents) "were aware of the falsity of the statements when they were made." (JA 42-43.)

"Despite repeated requests, Tory . . . refused to cease his picketing efforts unless he was paid a monetary 'settlement' by Cochran." Tory admitted that, in the absence of such a payment, "unless prevented by a judgment or some other process of [the] court, he [would] continue to picket" and the trial court specifically found that he would so continue. (JA 43.)

Based on the forgoing factual determinations, Judge Ronald Sohigian concluded:

> **"This is not a matter of speech related issues: It is simply the use of false and defamatory and privacy-invading communications to coerce or attempt to improperly coerce payment of money in tribute for or premium for desisting from that type of activity."** (JA 43.)

Judge Sohigian also found that Cochran would suffer irreparable harm as a result of Tory's coercive and unprotected conduct, and that a multiplicity of actions would be engendered, without an injunction. (JA 43-45.)

SUMMARY OF ARGUMENT

The Injunction issued by the Los Angeles Superior Court is constitutional. It is the end product of a lawsuit wherein Cochran successfully established, not only that he had been defamed and had his privacy invaded by Tory, but also that Tory had engaged in blatant and repeated acts of what clearly constitutes both criminal and civil attempted extortion – speech-related conduct that is **not** protected by the First Amendment.

Further, Tory admitted that, absent a court order prohibiting him from doing so, Tory would continue his disruptive, offensive, tortious and criminal use of the public forum as leverage for extortion efforts. In so doing, Tory would necessarily infringe upon the rights of Cochran, Cochran's clients and potential clients and the public in general.

The government has a significant interest in preventing Tory from engaging in unprotected speech-related conduct to the detriment of the public. The judicial branch has therefore rightfully enjoined Tory from carrying out his stated intention of renewing his disruptive campaign to extract payment from Cochran "in tribute for" Tory ceasing his picketing and ending his campaign to harass and annoy the public in general and Cochran in particular, thereby disrupting Cochran's business and interfering with his ability to practice law.

Tory has demonstrated that he will not hesitate to misuse the public forum by taking advantage of his right to freely express himself in the hopes of achieving personal gain. Under these circumstances, the least restrictive means of curtailing Tory's insistence on treating his fellow citizens as pawns in his extortion scheme to extract money

from Cochran is to deprive him of the right to discuss Cochran in the public forum.

The Injunction does not distinguish between "good" and "bad" expression about Cochran; any public communication on the subject of Cochran is prohibited. Because it is content-neutral and specifically targeted at remedying the particular wrongful conduct in which Tory has engaged, and preventing a recurrence thereof, the Injunction is not an unconstitutional prior restraint. Moreover, because it stifles only unprotected speech of little or no social value, and prevents Tory from unjustifiably infringing the rights of Cochran and others, this Court should allow the Injunction to stand by following cases such as *Madsen v. Women's Health Center, Inc.* 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network Of Western New York*, 519 U.S. 357 (1997) and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), where the constitutionality of similar and analogous orders was recognized.

ARGUMENT

I. AT ISSUE IS WHETHER IT IS CONSTITUTIONAL TO PROHIBIT TORY FROM EXERCISING HIS SPEECH RIGHTS IN A "PUBLIC FORUM" IN ORDER TO PRECLUDE FURTHER EXTORTION EFFORTS

The question purportedly presented by Petitioners is whether a permanent injunction "preventing all future speech" about a public figure violates the First Amendment when it is issued as a "remedy in a defamation action." (MB i.) This is not the question that is before the Court, however, for two reasons:

First, the Injunction does not extend to "all future speech" by Tory about Cochran; Petitioners are exaggerating when they say that "Tory and Craft cannot say anything about Cochran" while the current Injunction is in place. (MB 8.) Paragraph 2 of the Injunction prohibits Tory from picketing and making written or oral statements about Cochran "**[i]n any public forum**." (JA 34 (emphasis added).)[5] A "public forum" is not the same as "anywhere."[6] Thus, although it is broad, the Injunction is not as broad as Tory describes it.

Second, this is not just a "defamation action." Cochran successfully prosecuted, not only four defamation claims (for libel, libel *per se*, slander and slander *per se*) against Tory, but also a cause of action for invasion of privacy. More importantly, evidence was presented at trial from which the fact-finder conclusively determined that Tory's communications about Cochran "were actually made for the purpose of inducing Cochran to pay Tory various

[5] The remaining provisions (which are not discussed in Tory's Brief on the Merits and hence are not at issue here) restrict or prohibit conduct described as "[s]tanding, assembling or approaching" Cochran and "[c]ontacting, harassing, threatening, stalking, disturbing the peace of, keeping under surveillance or blocking the movements of Cochran."

[6] Under California law, a public forum exists only in a location that: (i) is "open to the public"; and (ii) is a place where "information is freely exchanged." (*Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 469, 475 (2000). Under federal law: (i) "traditional public forums" are places such as streets and parks that, by long tradition, have been devoted to assembly and debate; and (ii) "designated public forums" (also known as "limited public forums") are those created by government designation. (16A Am.Jr.2d *Constitutional Law* § 519, citing to *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 360 (1996).)

amounts of money to which Tory was not entitled." (JA 42.[7]) As such, Tory's conduct also necessarily constituted "attempted extortion," which is both a tort and a crime.[8]

Based on Tory's "Question Presented," it is clear that Tory is not challenging the Superior Court's findings that Tory defamed Cochran, invaded Cochran's privacy, and engaged in the acts that constituted attempted extortion. It is equally clear that the abstract question of "[w]hether a permanent injunction . . . preventing **all future speech** about Cochran" can constitutionally issue, cannot be answered based on the record before this Court, because the Injunction does not prohibit "all future speech about" Cochran.

Given the actual language of the Injunction, the question that can be answered is:

> **"Whether, *under the facts of this case*, the *specific Injunction issued by the Los Angeles***

[7] Paragraph (27) of the Statement of Decision reflects the following finding, made by Judge Sohigian: "This is not a matter of speech related issues: it is simply the use of false and defamatory and privacy-invading communications to coerce or attempt to improperly coerce payment of money in tribute for or premium for desisting from that type of activity." (JA 43.)

[8] Section 518 of the California *Penal Code* defines "extortion" as "the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear. . . ." Section 519 provides that "fear," as used in Section 518, "may be induced by a threat, either: [¶] 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or, [¶] 2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or, [¶] 3. To expose, or to impute to him or them any deformity, disgrace or crime . . . " Section 524 punishes "[e]very person who attempts, by means of any threat, such as is specified in Section 519 of this code, to extort money or other property from another. . . ."

***Superior Court* – which precludes Tory and his agents from picketing and making oral and written statements about Cochran *only* "*in the public forum*" – violates the First Amendment."**

The answer to this question is "no." Cochran's lawsuit against Tory was tried to conclusion. Based on the evidence offered at trial, the trier of fact made findings supporting Cochran's contentions that: (i) the conduct which Tory is enjoined from engaging in is not the type of expression that is protected by the First Amendment; and, (ii) the Injunction is drawn as narrowly as possible in light of its purpose.

II. THE INJUNCTION ENJOINS TORY FROM RENEWING HIS TORTIOUS AND ILLEGAL EXTORTION ATTEMPTS AND DOES NOT AFFECT ANY INFORMATION THAT IS OF PUBLIC CONCERN

A. The Evidence Supporting The Findings Made By The Fact-Finder Should Not Be Re-Weighed By This Court

After a full trial on the merits, the Los Angeles Superior Court issued a "Statement of Decision" pursuant to Section 632 of the California *Code of Civil Procedure*[9] and Rule 232 of the California *Rules of Court*.[10] Therein, the

[9] Section 632 provides, in pertinent part, "[t]he court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at trial."

[10] Rule 232 provides, in pertinent part, "[i]f a statement of decision is requested, the court shall, within 15 days after the expiration of the time for proposals as to the content of the statement of decision,

(Continued on following page)

Honorable Ronald Sohigian, sitting as the trier of fact, made 32 specific findings supporting the issuance of the Injunction. As discussed above, Tory largely ignores the Statement of Decision, and in his "Statement of the Case," cites instead to his own trial testimony as he describes his version of the underlying events. In so doing, Tory is implicitly and improperly asking this Court to re-examine and reject the findings made by the trier of fact.

It is not the role of the United States Supreme Court to "exert its jurisdiction merely to review a decision of a state court upon a question of fact." (Stern, Grossman, et al., *Supreme Court Practice,* ¶3.27 [8th ed. 2002].) "[O]nce a case is otherwise before it, the [Supreme] Court generally will not re-examine the state court's findings and conclusions of fact." (*Id.*) To the contrary, "in the absence of exceptional circumstances," the nation's highest court "defer[s] to the state-court factual findings." (*Hernandez v. New York*, 500 U.S. 352, 366 (1991); *see also, Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) [injunction issued based on "uncontradicted evidence of harmful intent" introduced at the trial court level]; *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 709 (1931) [Supreme Court "is not concerned with mere errors of the trial court"].)

Tory's efforts to transform the constitutional question raised herein into a challenge to the trial court's factual findings should not succeed. This Court is being called upon to decide whether the Injunction is constitutional **under the facts found by the trial court to exist**, not

prepare and mail a proposed statement of decision and a proposed judgment to all parties who appeared at trial. . . ."

to re-weigh the evidence presented at trial or to assess the constitutionality of an injunction issued under facts **different** from those set forth in the Statement of Decision.

B. The Fact-Finder Determined That Tory Abused And, Absent The Injunction, Will Continue To Abuse, His Right To Speak Publicly About Cochran By Using His Expression For Tortious And Illegal Purposes

1. The Speech Here At Issue Was Defamatory

Prior to the issuance of the Injunction, Tory publicly made:

> **"[S]tatements to the effect that Cochran owed a substantial amount of money to Tory; that Cochran owed debts to Tory based on breaches of past oral and written agreement[s;] that Cochran acted dishonestly or below the standard of care in prior legal representation of Tory; and that Cochran is a bad character and/or a substandard practitioner of the law."** (JA 41-42.)

At trial, it was determined that: (i) these statements were "untruthful, misleading and malicious" (JA 41); (ii) the statements Tory published "were false when they were made" and "were made maliciously and with reckless disregard for the truth"; and, (iii) "Tory . . . [was] aware of the falsity of the statements when they were made." (JA 42.)

The foregoing findings establish that Tory defamed Cochran, and the trial court so ruled. That ruling is not being challenged by Tory.

2. Tory's Conduct Was Not Merely Defamatory; It Was Also Invasive Of Cochran's Privacy And Designed To Extort Money From Cochran

Tory characterizes the "Question Presented" by his Petition, in part, as whether the Injunction is a proper "remedy in a defamation action." (MB i.) At trial, however, Cochran also successfully proved "invasion of privacy." More importantly, Cochran obtained a ruling that Tory's actions were "intentionally targeted at preventing person(s) from entering Cochran's place of business for legal services and creating a negatively charged and ominous environment" *until such time as "Tory . . . was paid a monetary 'settlement' by Cochran."* (JA 42 (emphasis added).) Tory not only made tortious statements, he made them "for the purpose of inducing Cochran to pay Tory various amounts of money to which Tory was not entitled." (JA 42.) Moreover, Tory has admitted that, unless enjoined, he will resume this wrongful conduct. (JA 43.)

Accordingly, the trial court concluded that the conduct about which Cochran complained was much more than just defamation; it was:

> **"[T]he use of false and defamatory and privacy-invading communications to . . . attempt to . . . coerce payment of money in tribute for or premium for desisting from [continuing to engage in] that activity."** (JA 43.)

Under California law, the foregoing facts establish "attempted extortion" on the part of Tory, which is both a crime and a tort. (California *Penal Code* §§ 518, 519; *see, e.g., Flatley v. Mauro*, 121 Cal.App.4th 1523 (2004) [analyzing a claim for "civil extortion" by reference to citing Sections 518 and 519 of the California *Penal Code*].)[11]

C. Tory's Extortionist Comments Were Not Part Of Any Legitimate Public Debate Or Commentary

Tory characterizes the speech here at issue as discussion "about the practice of law and the operation of the legal system." (MB 12-13.) He claims that he "picketed because he believed that he had not been treated fairly by Cochran, that he had not been represented adequately by Cochran, and that he had been deceived by Cochran into thinking that he would be refunded money" (MB 3). He argues that he has a right to "inform the press and the public of [his] experiences, including how [he was] treated by" Cochran. (MB 13.) If these assertions were supported by the record, Tory might have a point. However, they are not.

First, there is no restriction whatsoever on Tory's right to speak about lawyers or the legal system generally. The Injunction governs only "statements about Cochran and/or Cochran's law firm." (JA 34.) It does not impact commentary about other lawyers or this country's judicial system. Thus, it is incorrect to imply (as Tory does) that Cochran is asking this Court to condone stifling public criticism about issues of general interest; Cochran is not.

[11] *See also* fn. 8, *supra*.

Second (and most important), Tory is disingenuous when he argues that he was picketing for a legitimate purpose (*i.e.*, because he "believed he had not been treated fairly" or "represented adequately" and because he honestly thought Cochran had "deceived" him). The trial court, acting as a finder of fact, rejected these contentions and determined that Tory's purpose in demonstrating was "to coerce or attempt to improperly coerce payment of money in tribute for or premium for desisting" the intrusive and damaging activity. (JA 43.) Thus, the question at bar is whether it is unconstitutional to restrict extortionist conduct, not whether Tory may be restrained from expressing honest opinions.

Third, the Injunction did not issue to stop Tory from communicating information regarding his experiences with Cochran. It issued because:

> **"The picketing conduct of Tory and his agents was intentionally targeted at preventing person(s) from entering Cochran's place of business for legal services and creating a negatively charged and ominous environment."** (JA 41-42.)

Moreover, the placards carried by Tory and his recruits did not contain factual information "about the practice of law and the operation of the legal system," nor do they relate to "how [Tory] was treated" by Cochran. (MB 13.) Rather, they contained distasteful and inflammatory slogans such as "Attorney Johnnie L. Cochran, Esq., Your Piss is Not Rain," and "Cochran Screwed You Guys

Too." (JA 41.)[12] These types of statements, made for the purpose of disrupting Cochran's business (JA 42, 43), and with the specific intent to extort money from Cochran (JA 43), were properly enjoined.

III. THERE IS NO FIRST AMENDMENT RIGHT TO USE FALSE, DEROGATORY, BIZARRE AND OBSCENE SPEECH AS A MEANS TO ATTEMPT TO EXTORT MONEY

Petitioners do not deny that Cochran satisfied the requirements for issuance of an injunction pursuant to California *Code of Civil Procedure* Section 526.[13] Instead they argue that, regardless of whether the statutory prerequisites were met, the Injunction should not have issued because it unconstitutionally infringed Tory's First Amendment guarantee of freedom of speech. It is not,

[12] The Injunction identifies the following statements, which were offered into evidence at trial: (1) "Johnnie is a crook, a liar and a thief. Can a lawyer go to heaven? Luke 11:46"; (2) Hey Johnnie How Much Did They Pay $$ you to F_ _ k Me?; (3) "You've been a BAD, BAD boy, Johnnie Cochran"; (4) "Attorney COCHRAN we have no use for Illegal Abuse"; (5) I Know How It Feels to be Terrorized; (6) Absolute Discrimination; (7) "Attorney Cochran, Don't We Deserve at Least the Same Justice as O.J.?"; (8) Unless You Have O.J.'s Millions You'll be Screwed if You Use J. L. Cochran, Esq.; (9) Johnnie L. Cochran, Esq., Your Piss is Not Rain; (10) "Attn: Attorney Johnnie L. Cochran, Jr., Flaunting and Flossing It's the People He's Costing"; (11) Attorney Johnnie, It's Past Time; (12) Johnnie Cochran I Know What You, the County and the City did [sic] my case; and, (13) "Don't Laugh, Cochran Screwed You Guys Too." (JA 53-54.)

[13] Section 526 provides, in pertinent part, "[a]n injunction may be granted . . . [w]hen it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually."

however, unconstitutional to judicially proscribe a citizen from engaging in **unprotected** speech activities, which is exactly what Tory was enjoined from doing.

Speech – particularly defamatory and otherwise tortious speech – used as part of an extortion effort is not protected by the First Amendment. As Justice Stevens, concurring, wrote in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992):

> **"Although the First Amendment broadly protects 'speech,' it does not protect the right to 'fix prices, breach contracts, make false warranties, place bets with bookies, *threaten [or] extort.*'"** (Emphasis added.) (*R.A.V.* at 420, quoting Frederick Schauer, "Categories and the First Amendment: A Play in Three Acts," 34 Vand. L.Rev. 265, 270 (1981).)

The Court of Appeals for the Fifth Circuit has stated this principle even more clearly:

> **"[E]xtortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all."** (*U.S. v. Quinn*, 514 F.2d 1250, 1268 (1975).).

The Fourth Circuit expressed similar sentiments in *United States v. Marchetti*, 466 F.2d 1309, 1314 (4th Cir. 1972), where it was held that "[t]hreats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal." Finally, in *Flatley*, *supra*, 121 Cal.App.4th at 485-86, the California Court of Appeal noted that neither the federal nor the state courts recognize expression used for the purpose of

attempted extortion as "a constitutionally protected form of speech."

The Injunction prohibited speech-related activity only because speech (both written and oral) was the medium through which Tory accomplished his attempted extortion (along with other tortious and/or criminal conduct). As illustrated by the above authorities, however, speech used in an extortion attempt is not protected. The Injunction, therefore, is not constitutionally infirm to the extent that it necessarily enjoins speech and other expressive activity as part of its order requiring Petitioners to cease and desist their wrongful extortion efforts.[14]

IV. AN INJUNCTION IS NOT NECESSARILY "PRIOR RESTRAINT" OR OTHERWISE IMPROPER JUST BECAUSE IT AFFECTS SPEECH

A. Petitioners' Analysis Of The Meaning And Effect Of "Prior Restraint" Is Erroneous

1. The Injunction Does Not Constitute Prior Restraint

Cochran does not dispute the importance of protecting the safeguards guaranteed by the First Amendment. He agrees that "debate about important issues of public concern" (MB 12) should not be stifled. He even acknowledges the "heavy presumption against [the] constitutionality" of a prior restraint (MB 18, citing *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317 (1980)), and the

[14] The necessity for the broad scope of the prohibition is discussed under heading V, below.

general principle that prior restraint is a disfavored remedy. (*See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).) However, none of this matters because, as explained below, the Injunction is not a "prior restraint."

a. Not All Permanent Injunctions Affecting Speech Act As Previous Restraint On Expression Because Not All Expression Is Unconditionally Protected By The First Amendment

Petitioners are wrong when they state that "permanent injunctions . . . that actually forbid speech activities" are necessarily presumptively unconstitutional as prior restraints. (MB 14, 18.) In fact, the opposite is true:

> **"Not all injunctions that may incidentally affect expression are 'prior restraints.'"** (*Madsen, supra*, 512 U.S. at 763, fn. 2.)

As the Court in *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973) held:

> **"It has never been held that all injunctions [affecting expression] are impermissible."**

"Prior restraint" exists only where the government is given discretion to regulate or prohibit **protected** speech (*Ward v. Rock Against Racism*, 491 U.S. 781, 812 (1989) (Justice Marshall, dissenting)); it has no application to **unprotected** expression, such as obscenity. (*See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).) Accordingly, since speech and other expressive

conduct used for the purpose of attempting to extort money is not protected by the First Amendment,[18] it is not prior restraint to enjoin extortion. (*See, e.g., NOW v. Scheidler*, 1999 WL 57010 (N.D. Ill. July 28, 1999).)

Likewise, expression incident to defamation is often outside "the area of constitutionally protected speech." (*Beauharnais v. Illinois*, 343 U.S. 259, 266 (1952); *New York Times v. Sullivan*, 376 U.S. 254 (1964).) For example, there is no protection for a false and otherwise defamatory statement "relating to" a public figure's "official conduct" that is made "with knowledge that it was false or with reckless disregard of whether it was false or not." (*New York Times* at 279-280.) Similarly, most libelous and slanderous communications about private citizens or about something other than the "official conduct" of a public figure, remain unprotected. (*See, e.g., Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 339-340 (1974).)

Finally, the First Amendment does not protect either a proven tortious invasion of privacy or the speech attendant thereto (unless the privacy invading information was obtained by a media defendant from the official public record). (*See, e.g., Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 494-495 (1975).)

b. Enjoining Expression That Has Been Adjudicated As Unprotected Is Not Prior Restraint

In cases such as *Paris Adult Theatre I, supra*, and *Pittsburgh Press, supra*, injunctions restricting expression

[18] *See* discussion under heading III above.

that was determined, after trial, to be unprotected, withstood constitutional scrutiny. In *Paris Adult Theatre*, for example, the constitutionality of an injunction prohibiting the exhibition of a film was affirmed. Although expression was obviously affected by the order, there was no "prior restraint" because the injunction issued "after a full adversary proceeding and a final judicial determination . . . that the [film was] constitutionally unprotected" based on its obscene content. (*Paris Adult Theatre* at 55.)

In *Pittsburgh Press, supra*, an order prospectively forbidding a newspaper to publish certain types of information (specifically, whether perspective employers preferred male or female applicants) was, like the injunction in *Paris Adult Theatre*, found not to be a "prior restraint." A fact-finder had determined that the practice did not comply with state law, and the Court was asked to enjoin future conduct based on past statutory violations. It was able to constitutionally do so because a "continuing course of repetitive conduct" was being enjoined, which meant that the court was not "asked to speculate as to the effect of" the future conduct. It could reasonably assume that the violative conduct that had occurred in the past would continue into the future and would have the same consequences in the future as it had had in the past.

The foregoing authorities conclusively refute Petitioners' generalized conclusion that any restriction imposed by the government on future speech necessarily constitutes "prior restraint." In fact, there is no proscription against injunctions limiting, and even prohibiting, conduct that is unlawful and/or speech that is unprotected. (*See, e.g., Madsen, supra*, at 764, fn. 2, 766, 798 [injunctions imposed based on prior unlawful conduct are not prior restraint];

Freedman v. Maryland, 380 U.S. 51, 58 (1965) [unprotected films may be barred].)

In this case, there has been a "full adversary proceeding and final judicial determination" that the defamatory privacy invading and extortionate conduct prohibited by the Injunction from recurring, is constitutionally unprotected. The Injunction, therefore, is **not** a prior restraint, notwithstanding Petitioners' insistence on referring to it as such. (*Cf.*, *Vance, supra* [prior restraint existed where a statute allowed a court to enjoin the showing of motion pictures "that [had] not been finally adjudicated to be obscene"].) Petitioners' suggestion that the Injunction must be dissolved, simply because it prospectively restricts certain speech related activities, must therefore be rejected out of hand.

c. Only Injunctions Prohibiting Expression That Could Be Found To Be Protected May Constitute Prior Restraints

Petitioners cite cases for the principle that injunctions may, even after trial, be held to be prior restraints by a higher court. These authorities do not assist them in establishing that the Injunction here at issue – entered after unlawful conduct and unprotected speech **was found** to have occurred – is improper. The four-part test articulated in the "seminal case concerning prior restraints" (MB 15) of *Near, supra*, for example, when applied to the facts of this case, reveals that the Injunction here is practically the antithesis of prior restraint.

In *Near*, a challenge was brought to an injunction issued pursuant to a statute that provided for the "abatement as a

public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical'" unless the "truth" of the objectionable material could be shown as well as publication "with good motives and for justifiable ends." (*Id.* at 702.) It was determined that the statute infringed the guaranteed "liberty of the press" by "impos[ing] an unconstitutional prior restraint upon publication" (*Id.* at 713, 723) because: (i) it "was not aimed at the redress of individual or private wrongs" (*Id.* at 709); (ii) it was designed to inhibit publication by newspapers and periodicals of information in which the public has a legitimate interest, such as "charges against public officers of corruption, malfeasance in office, or serious neglect of duty" (*Id.* at 710); (iii) "[t]he object of the statute [was] not punishment . . . but suppression of the offending newspaper or periodical" (*Id.* at 711); and, (iv) the description "malicious, scandalous or defamatory" was not adequate to put citizens on notice of the type of expression that could trigger the statute. Therefore, in order to enforce the law, the court necessarily had to engage in "effective censorship." (*Id.* at 712.)

Although the *Near* test was not explicitly applied in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the *Keefe* court cited *Near* as support for its finding that an "injunction against peaceful distribution of informational literature" constituted "an impermissible restraint on First Amendment rights" because it "operate[d] **not to redress alleged private wrongs**, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." (*Keefe* at 418-419.) (Emphasis added.) Accordingly, the *Keefe* court established that the most critical element of the four-pronged *Near* test is whether

the challenged injunction was designed to redress "individual or private wrongs."

d. The Injunction Is A Proper Remedy In This Case Because It Governs Conduct That The Trial Court Has Already Found To Be Unlawful

According to Petitioners, "*Near*, *Keefe* and *Vance* establish that even though a permanent injunction follows trial, it is still unquestionably a prior restraint on speech." (MB 17.) From this already faulty premise, Petitioners draw yet another inaccurate conclusion, *to wit*, that the Court of Appeal in this case formulated the rule that "a permanent injunction is not a prior restraint if it follows trial." (MB 17, citing JA 56-57.) What the Court of Appeal **actually** said was that "an injunction does not constitute an impermissible prior restraint" **if "there has been a final adjudication on the merits and *the speech at issue is determined to be unprotected.*"** (JA 57 (emphasis added).)

Neither Cochran nor the Court of Appeal contends that **every** permanent injunction that issues after **every** trial is constitutional, nor does Cochran argue that the mere fact that he has fully litigated his claims against Tory **automatically** justifies the Injunction. The constitutionality of the Injunction does not derive from the fact that there **was a trial**; it derives from the nature of the findings that were made **at the trial**.[16]

[16] The fact that prior restraint was found to exist after trial (or hearing) in *Near*, *Keefe* and *Vance*, is of little or no relevance to the First Amendment analysis. In each of those cases, the restrictions would

(Continued on following page)

Specifically, it has been fully and finally determined that the Injunction passes constitutional muster. The trial court's findings confirm that: (i) the speech that has been affected by the Injunction here at issue is not protected by the First Amendment; (ii) the Injunction issued, not to suppress legitimate debate, but as a remedy for legally cognizable wrongs Tory committed against Cochran; and, (iii) the wrongs committed by Tory were part of a continuing course of repetitive wrongful conduct that would have continued, but for the Injunction (and would recur if the Injunction were lifted). It is these three factual findings that were made at trial – not the trial itself – that render the Injunction immune to Petitioners' challenges.

i. The Expression Affected By The Injunction Is Not Constitutionally Protected

The constitutional concern of the prior restraint doctrine is that a "communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment" has been made. (*Pittsburgh Press*, *supra*, at 390 (emphasis added).) Conversely, then, if "an adequate determination" has been made that a statute, ordinance, judicial decree or other act of government suppresses only communication that is "unprotected by the First Amendment," then there is no viable "prior restraint" challenge.

have been even more obviously unconstitutional if they had been imposed before trial. There, the facts found at trial established the existence of prior restraint. Here, however, the trial developed facts that compel the opposite conclusion.

Here, the Superior Court found that Tory committed the torts of libel, slander and invasion of privacy. (JA 38-53.) As explained above, Tory enjoys no First Amendment protection for that conduct; once the elements of those torts are found to exist, the expression is **unprotected** as a matter of law. Further, under no theory is there constitutional protection for extortionate conduct. Thus, the fact that the Injunction prohibits future conduct in the form of speech does not render the speech protected. (*See, e.g.*, *Roth v. United States* (*Alberts v. State of California*), 354 U.S. 476, 483 (1957) ["Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it"].)

ii. The Injunction Is "Subsequent Punishment," Not "Prior Restraint"

This Court has drawn a distinction between disfavored "prior restraint" and perfectly acceptable "subsequent punishment" imposed "after a full ... trial." (*Alexander v. U.S.*, 509 U.S. 544, 549-550, 553 (1993) [forfeiture order, even though it incidentally affected expression was not a prior restraint on speech, but a punishment for past criminal conduct]; *see also*, *Near* at 714-715 [statute was held unconstitutional, in part because it did not deal with punishment][17].) The rules governing prior restraint

[17] The statute in *Near* was "not aimed at the redress of individual or private wrongs" and in fact did not even "deal with punishments." (*Id.* at 709, 715.) Instead: **"It was aimed at the distribution of scandalous matter as 'detrimental to public morals and to the general welfare,' tending 'to disturb the peace of the community' and '... assaults and the commission of crime.... The law is not for the protection of the person attacked nor to punish**

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thus have "no application where ... an injunction against a private person operates 'to redress alleged private wrongs,' not to suppress a legitimate publication." (JA 56.)

The Court of Appeal correctly determined that the Injunction falls into the latter category (JA 56). It is directed only at Tory and his agents, and the facts found by the trial court establish that the Injunction is designed to protect Cochran from suffering further extortion attempts. It is also clear that Cochran is not attempting to keep the public from learning anything of value; the lies and obscenities Tory will spread if not enjoined from doing so are completely devoid of any redeeming value.[18] (*Cf.*, *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) [Court declined to enjoin publication of a classified study about Vietnam because information contained therein was deemed to be "of vital importance to the people of this country," and the media defendants who wished to disseminate the study had a "duty" to expose the "workings of government" and to keep the public informed[19]].)

the wrongdoing. It is for the protection of the public welfare.'" (*Id.* at 709.).) The same could hardly be said of Tory.

[18] *See* footnote 12, *supra*, for the type of statements being made by Tory.

[19] Justice Black wrote: "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.... The press was protected so that it could bare the secrets of government and inform the people.... In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly.... [T]he newspapers nobly did precisely that which the Founders hoped and trusted they would do." (*New York Times, supra*, at 717.) The same could hardly be said of Tory.

iii. The Continuing Course Of Wrongful Conduct Established At Trial May Be Enjoined

Tory cites the case of *Vance v. Universal Amusement Co.*, *supra*, for the principle that "prohibiting future conduct after a finding of undesirable present conduct" is a "mistake." (MB 16.) *Vance* does not suggest, however, that future conduct can never be prohibited based on past indiscretions. It held simply that "the heavy hand of the public nuisance statute" – particularly when "coupled with the Texas Rules of Civil Procedure governing injunctions" – was not sufficiently "sensitive" to effectively distinguish between protected and unprotected speech for purposes of determining what could and could not be enjoined. (*Vance* at 311, fn. 2.)

Thus, *Vance* does not contradict the accepted rule that future speech may be restricted without running afoul of the general prohibition against prior restraint, so long as evidence is presented at an adversary hearing which demonstrates that the speech to be restricted in the future is part of a "continuing course of repetitive conduct" consisting of communications that have been shown to be "unprotected." (*Pittsburgh Press* at 379; *see also*, *Auburn Policy Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993); *Retail Credit Corp. v. Russell*, 234 Ga. 765 (1975); *Aguilar v. Avis Rent A Car Systems, Inc.*, 980 P.2d 846, 21 Cal.4th 121 (1999).) This rule evolved because where there is ongoing wrongdoing, a court is not "required to speculate as to the effect of publication" of the future speech, and therefore may constitutionally enjoin or limit it. (*Id.*)

Here, it has been conclusively established, not only that Tory's picketing and other conduct was unprotected as extortion, libel and/or other tortious conduct, but also that:

> **"Despite repeated requests, Tory . . . refused to cease his picketing efforts unless he was paid a monetary 'settlement' by Cochran."** (JA 43.)

Tory also admitted that, in the absence of such a payment, "unless prevented by a judgment or some other process of [the] court, he [would] continue to picket" and the trial court specifically found that he would so continue. (JA 43.)

It is therefore clear that "a continuing course of wrongful conduct" was conclusively established by Cochran, and the trial court was correct in enjoining Tory from engaging in more such acts in the future.

2. The Injunction Would Not Necessarily Be Unconstitutional Even If It Did Operate As A Prior Restraint

As explained above, the Injunction here at issue quite clearly does **not** constitute a prior restraint. Hence the rules that apply to prior restraints and the higher standard of scrutiny that must be employed in the evaluation thereof have no place in this proceeding. It is worth noting, however, that even assuming, *arguendo*, that this Court deemed the Injunction to be a prior restraint, its constitutionality could still be upheld because "[it] has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid." (*Times Film Corporation v. Chicago*, 365 U.S. 43, 47 (1961) [finding that a "challenged section of an ordinance" that "[a]dmittedly . . . impose[d] prior restraint" by "requiring the submission of films prior to their public exhibition," was not void on its face]; *see also*, *Near*,

supra, at 716 ["protection even as to previous restraint is not absolutely unlimited"].)

The truth of these comments is borne out by the decision in *Kingsley Books v. Brown*, 354 U.S. 436 (1957). There, a statute made injunctive relief available as a civil remedy against the sale or distribution of obscene material. The law was found to constitute prior restraint because the threat of such civil prosecution "provide[d] an effective deterrent against distribution prior to [an] adjudication" of obscene content in materials for sale. (*Id.* at 443.) The Court did not end its analysis there, however, commenting:

> **"The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test."** (*Id.*)

Accordingly, the Court had a "duty" to engage in a "particularized analysis," and it did so. (*Id.* at 441-442.) Because the civil remedy at issue in *Kingsley* was less restrictive of freedom of expression than a parallel criminal statute that had been upheld in *Roth*, *supra*,[20] it was determined to be constitutional.

Hence, even if the Injunction here at issue were a "prior restraint," it would not necessarily be unconstitutional. It "avoids constitutional infirmity . . . if it takes place under procedural safeguards designed to obviate the

[20] Significantly, though the defendant in the *Alberts v. California* part of the *Roth* case was "completely separated from society for two months" and "seriously restrained from trafficking in all obscene publications for a considerable period of time" (two years), the criminal statute at issue therein was found to be constitutional.

dangers of a censorship system." (*Freedman*, *supra*, at 58.)[21]

3. The Absence Of Authority Specifically Condoning Prior Restraint As A Remedy In A Defamation Action Does Not Compel Reversal Of The Court Of Appeal

Petitioners' argument that "this Court never has upheld a prior restraint as a permissible remedy in a defamation action" (MB 19) is somewhat misleading, and largely irrelevant. It is irrelevant because Cochran is not arguing that he is entitled to impose prior restraint on Petitioners by virtue of his defamation claim; he is arguing that the Injunction – **which is not a prior restraint** – is constitutional because it issued to enjoin what the Court found to be extortionate conduct.

Moreover, even if the Injunction is characterized as a prior restraint, the absence of precedent wherein prior restraint was ordered as a remedy for defamation is not significant unless there is precedent wherein a defamation plaintiff **sought**, but was denied, that remedy under facts analogous to those at bar.

[21] Those procedural safeguards in the context of film exhibition require the following: "First, the burden of proving that the film is unprotected expression must rest on the censor. . . . Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. . . . [Third], the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film." (*Id.*)

Finally, the possibility that a constitutional prior restraint could be a remedy for defamation has specifically been considered (albeit in the abstract). In support of its holding that prior restraint is not necessarily unconstitutional, the *Times Film* court noted that a unanimous Supreme Court, in *Chaplinsky v. State of New Hampshire*, 315 U.S. 368 (1942), "held that there were 'certain well-defined and narrowly limited classes of speech'" – including "libelous . . . words" – "the prevention and punishment of which have never been thought to raise any Constitutional problem" because "by their very utterance" they "inflict injury." (*Times Film*, *supra*, at 48, citing *Chaplinsky* at 571-572.) If libel is thus exempt from First Amendment constraints, then there is no basis for refusing to enjoin it.

B. Cochran's Remedy Is Not Limited To Damages

1. Current Law Regarding The Tortious Violation Of Privacy And Extortion Permits An Award Of Injunctive Relief Under The Facts At Bar

Citing primarily inapposite cases that are close to a century or more old, involve media defendants, and interpret state constitutions, Petitioners argue that "prior restraints" are not a permissible remedy in this case. In so doing, Petitioners again fail to acknowledge that the Injunction is not (or at least is not necessarily) a prior restraint.[22]

[22] *See* discussion under heading IV.A.1., *supra*.

Petitioners also conveniently ignore the fact that Cochran successfully sued Tory for invasion of privacy – a tort for which the remedy of an injunction has frequently been sought and granted in federal courts. (*See, e.g., Doe v. McMillan*, 412 U.S. 306 (1972) [addressing the question of congressional immunity in the context of a lawsuit seeking, among other things, injunctive relief for alleged invasions of privacy that had occurred or would occur by virtue of dissemination of a governmental investigation into the public schools in the District of Columbia]; *Michaels v. Internet Entertainment Group, Inc.*, 5 F.Supp.2d 823 (C.D. Cal., 1998) [preliminary injunction issued prohibiting dissemination of a video tape showing the plaintiff engaged in sexual activity].)

Finally, and most importantly, there is no discussion in Petitioners' Brief on the Merits, of the pervasive and ongoing extortion attempts recognized by the trial court, which create another independent entitlement to an injunction. (*See, e.g., United States v. Sasso*, 215 F.3d 283, 285 (2d Cir. 2000) [complaint filed seeking to enjoin extortion by organized crime].)

2. Petitioners Overstate The Modern Application Of The Adage That "Equity Will Not Enjoin A Libel"

While Cochran does not dispute that in the eighteenth, nineteenth and early twentieth centuries, the "traditional rule . . . that equity has no jurisdiction to enjoin a libel" was often applied, the proscription is not as broad as Petitioners suggest. In the labor context, for example, there are a number of United States Supreme Court decisions where it has not been strictly applied. In *American Steel Foundries v. Tricity Central Trades Council*,

257 U.S. 184, 206-207 (1921), for example, the Supreme Court opined that strikers and sympathizers involved in a labor dispute should be "enjoined from congregating or loitering at the plant [that was the target of a strike] or in the neighboring streets," and further that they should be "admoni[shed] that their communication . . . shall not be abusive, libelous or threatening."

A request that libel be enjoined was similarly entertained in *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983). There, a restaurant filed a lawsuit seeking "a temporary restraining order and preliminary and permanent injunctive relief" against disgruntled picketing employees for, among other things, libel. (*Id.* at 734.) Although the application for a preliminary injunction was denied, a temporary restraining order issued (*Id.*)

Finally, the Court in *dicta* in *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), responded to a First Amendment challenge to a "proscription against misrepresentations by labor organizations in the course of appeals to consumers," by commenting:

> **"[W]e should not be understood as declaring that the section and its criminal sanction would be unconstitutional if they proscribed damaging falsehoods perpetrated unknowingly or without recklessness. We have not adjudicated the role of the First Amendment in suits by private parties against nonmedia defendants. . . ."** (*Babbitt* at 309, fn. 16.)

The *Babbitt* court, therefore, apparently considered the question to be an open one.

The foregoing authorities (and many others) call into serious question, the modern precedential value of the centuries-old law on which Petitioners rely.

C. The Injunction Does Not Unduly Burden The Court

With remarkably little authority, Petitioners argue that:

> **"Injunctions have not been, and should not be permitted in defamation cases [because] . . . [a]ny *effective* injunction will be overbroad and any *limited* injunction will be ineffective."** (MB 26 (emphasis in original).)

In their attempts to support this statement, Petitioners have again improperly used the terms "[p]rior restraints" and "injunctions" interchangeably, which renders the already thin analysis in their Brief on the Merits even less persuasive.

It appears, however, that the theory being advanced by Petitioners is that Cochran has no **right** to enjoin future conduct, and no **reason** to enjoin past conduct. If this were the law, then the remedy of injunctive relief would effectively be rendered nugatory.

Petitioners' hypothesis also ignores the fact that the evil Cochran seeks to avoid is the wrongful extortionist **conduct** which Petitioners are almost certain to resume if the existing Injunction is narrowed. The only way this wrong can effectively be remedied is by proscribing **all** discussion about Cochran by Petitioners in the public forum, while allowing them the freedom to make **any** statements about Cochran outside of the public forum. Thus, the bounds of the existing

Injunction are both "precise and clear," as required by *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), and neither the Court, nor Cochran, nor anyone else, will be required to "censor" Petitioners' speech, or to evaluate its content.

Further, this is not a case like *Southeastern Promotions, Ltd., supra*, where:

> **"Respondents did not permit the show to go on and rely on law enforcement authorities to prosecute for anything illegal that occurred. Rather, they denied [an] application [for a license to present live theatre] in anticipation that the production would violate the law."** (*Id.*)

Here, Cochran did "permit the show to go on," so to speak, and something "illegal" did occur. Cochran then "prosecute[d]" to conclusion, his resulting claims against Tory. After prevailing in that action, Cochran was awarded relief in the form of liberation from Tory's harassing, distracting and coercive behavior. To now deprive Cochran of the hard won fruits of his protracted legal battle with Tory would be the ultimate injustice.

Finally, as discussed under heading V below, the Injunction here at issue is **already** drawn as narrowly as possible to achieve the (admittedly conflicting) objectives of recognizing and protecting the rights and interests of Cochran, the government and the public, on one hand, and impinging on Petitioners' expression rights as little as possible, on the other.

V. THE INJUNCTION IS NOT CONSTITUTIONALLY OVERBROAD

Petitioners' final challenge is that the Injunction is constitutionally overbroad. It is content neutral, however, and it does not unnecessarily burden speech rights. Accordingly, it survives the "overbreadth" challenge.

In *Ward v. Rock Against Racism*, *supra*, the Supreme Court reaffirmed the circumstances under which a **statute** regulating the "time, place and manner" of expression is overbroad:

> **"[A] regulation of the time, place, or manner of protected speech must be narrowly tailored[23] to serve the government's legitimate, content-neutral interests but ... it need not be the least restrictive or least intrusive means of doing so."** (*Id.* at 798 (footnote added).)

In *Madsen*, it was explained that the First Amendment overbreadth challenges to an **injunction** (as opposed to a statute or ordinance) called for a different test. The *Madsen* court held that the First Amendment requires that the challenged provisions of the injunction must, in addition to being content-neutral, "burden no more speech

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[23] "[T]he requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.'" (*Id.* at 799, citing *United States v. Albertini*, 472 U.S. 675, 689 (1985).) The regulation may not, however, "burden substantially more speech than is necessary to further the government's legitimate interests," nor may it affect expression "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." (*Id.*)

than necessary to serve a significant governmental interest." (*Madsen*, *supra*, at 765.)

The Injunction here at issue must therefore satisfy the heightened *Madsen* standard in order to survive constitutional scrutiny. This is easily accomplished.

A. The Injunction Is Content-Neutral Because It Is Designed To Restrain Petitioners' Wrongful Conduct, Not To Suppress Any Specific Communications

In order to determine whether a statute, injunction, or the like is "content-neutral" for purposes of determining whether one of the above-referenced tests may be applied, "threshold consideration" is the "purpose" behind the regulation at issue. (*Madsen* at 763.) Thus, for example, in *Ward*, *supra*, a municipal ordinance requiring musicians performing in a city bandshell to use the City's amplification system, was found to be content-neutral because it "was not adopted because of any disagreement with the message conveyed by the music, but only because the City was attempting to control the volume of sound emanating from the bandshell." (*Ward*, *supra*, at 798, fn. 6; *see also*, *O'Brien v. United States*, 391 U.S. 367 (1968) [the "administrative" nature of a law forbidding the destruction of draft cards kept it from being content-based].)

Similarly, in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a municipal zoning ordinance that prohibited an "adult" movie theatre from locating "within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school" was held "content neutral." Despite the disparate treatment afforded different types of theatres, the District Court found that the

City Council's "*predominate* concerns" in adopting the ordinance were with the secondary effects of adult theaters – such as crime, reduced property values, and a lower quality of life – and not with the content of adult films themselves. (*Id.* at 47 (emphasis in original).) That intent, held the Supreme Court, was "more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." (*Id.*)

In determining content neutrality, courts have also asked whether the government has adopted a regulation of speech "without reference to the content of the regulated speech." (*Madsen* at 763, citing *Ward*, *supra*, 491 U.S. at 791; *see also*, *R.A.V.*, *supra*, 505 U.S. at 386 ["The government may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed"].) This standard was applied in the anti-abortion protest cases of *Madsen*, *supra*, and *Schenck*, *supra*. In both cases, it was held that the injunctions limiting various aspects of the protests were "content-neutral" because they were issued, "not because of the content of [the protesters'] expression, . . . but because of their prior unlawful conduct" (*Schenck*, *supra*, at 374, fn. 6, citing *Madsen*, *supra*, 512 U.S. at 764, n. 2.) Like *Renton*, the *Madsen* decision held that the fact that the **effect** of the injunctions was to suppress a particular type of expression did not change the content-neutral character of the expression at issue:

> **"That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at**

> **the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."** (*Madsen* at 763 (emphasis in original).)

When the above-described standards are applied to the facts at bar, it is inescapable that the Injunction, like the orders in *Madsen* and *Schenck*, and like the ordinance in *Renton*, is "content-neutral" for purposes of analyzing its constitutionality. As even Petitioners acknowledge in the first paragraph of their "Statement of the Case," the Injunction here at issue "prohibits . . . *all* future speech in any public forum – regardless of content or context." (MB 2.) Petitioners would be hard pressed, therefore, to argue that the content of their "message" is being regulated. Petitioners are as much in violation of the Injunction if they publicly praise Cochran as if they publicly criticize him.[24] That is the essence of neutrality.

Finally, although it addressed the constitutionality of a statute rather than an injunction, the case of *Virginia v. Black*, 538 U.S. 343 (2003) is worthy of note. *Virginia* held:

> **"The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate. . . . Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ."**

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[24] While only negative statements are typically consistent with extortion, Tory could just as easily demand unearned payments from Cochran in exchange for publicly making **positive** comments about Cochran.

Likewise, without running afoul of the First Amendment, the Los Angeles Superior Court "may choose to regulate," through the Injunction, picketing and related activity that it has found is being engaged in "with the intent to" attempt to extort money.

B. The Government Has A Significant Interest In Protecting Citizens' Rights To Earn A Living, Run A Business, And Generally, To Be "Left Alone"

Although the lawsuit that gave rise to the Injunction was filed to enforce Cochran's personal rights, the Injunction also serves "a number of governmental interests." (*Schenck, supra*, at 374.) Most significantly, the government has an interest in "protecting the property rights of all its citizens." (*Madsen* at 768.)

Cochran's right to run his business and practice a profession unquestionably "is . . . a protected property right." (*Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 413 (2003).) As part of this property right, Cochran has the right to make business decisions and to solicit business free from wrongful coercion." (*Id.* at 415, fn. 1 (Stevens dissent); *see also, United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978) [right to make business decisions free from outside pressure wrongfully imposed].) Tory, through his conduct and that of his agent, unlawfully interfered with **at least** the right to "solicit" business, if not actual income from new business that would have come in had Tory and his "hired guns" not

made it so difficult.[25] The Injunction obviously furthers this interest, as well as the "compelling interest" the state has "in the practice of professions within their boundaries . . . as part of their power to protect the public health, safety, and other valid interests." (*Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992), citing *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *see also Ferguson v. Skrupa,* 372 U.S. 726, 731 (1963); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).)

"[T]he prevention of fraud, the prevention of crime, and the protection of privacy" are three additional important "governmental interests" that have been recognized when weighing the constitutionality of government action against challenges from citizens (*Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 176-177 (2002)), as is "prevention of the erosion of confidence in the [legal] profession." (*Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995).) Other significant governmental interests recognized by the Supreme Court in *Schenck* include: "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights . . ." and the right to be "left alone." (*Schenck*, *supra*, at 372.) All of these interests are implicated by the Injunction.

In light of the foregoing, it cannot be argued (and significantly, Petitioners do not argue) that the Injunction does not further a myriad of governmental interests.

[25] Assuming *arguendo* that Cochran did not actually lose any business (that he knows of), it is still impossible to know what would have happened, had Tory acted differently.

C. Under The Facts Of This Case, The Least Burdensome Way For The Government To Protect Cochran From Ongoing Extortion Is To Prohibit Tory From Speaking About Cochran In Any Public Forum

The courts are consistently "called upon to reconcile the right of the Nation and the States to maintain a decent society" with "the right of individuals to express themselves freely." (*Jacobellis v. Ohio*, 318 U.S. 184, 199 (1964) (dissenting opinion).) Here, the tension is between, on one hand, the interest of Cochran and the government to curtail Tory's demands for an undeserved payment "in tribute for" ceasing his public campaign of disparagement, harassment, and business interruption and, on the other hand, Tory's right to continue to make public statements about Cochran after demonstrating his desire to maliciously make false and offensive statements about Cochran for the improper purpose of attempting to extort money.

By prohibiting Tory from "orally uttering statements about Cochran and Cochran's law firm" in a "public forum," the Injunction achieves a balance between these two countervailing considerations. Tory has not been completely deprived of his freedom of expression; he remains free to make comments about Cochran to his heart's content, so long as he does not do so in a public forum. Yet Cochran is reasonably assured that he will not be subjected to further extortion attempts by Tory, since Tory needs a public forum to create the type of "negatively charged and ominous environment" that Cochran might be willing to pay to get rid of.

VI. COCHRAN'S PUBLIC FIGURE STATUS DOES NOT DEPRIVE HIM OF HIS RIGHT TO BE FREE FROM EXTORTION, NOR DOES IT DIVEST HIM OF INJUNCTIVE RELIEF AS A REMEDY

Cochran has conceded his public figure status. (JA 42.) Petitioners nevertheless inexplicably belabor the point (at pages 11 and 12 of their Brief on the Merits). It is obvious that Tory is hoping that the Court will infer that, because Cochran is a public figure, anything Tory has to say about Cochran is of public interest. One need look no further than the Statement of Decision, however, to see that nothing could be further from the truth. Tory's comments about Cochran were either lies (as confirmed by the trial court), such as "Johnnie Cochran is a crook, liar and a thief," or they are bizarre meaningless statements, such as "Your Piss Is Not Rain." Regardless of how important Cochran may be in the public eye, the speech Tory used in his attempts to extort money from Cochran remains completely valueless. Moreover, the trial court found the existence of malice. (JA 42-43.)

VII. IN THE EVENT THAT THE INJUNCTION IS HELD NOT TO COMPORT WITH CONSTITUTIONAL DICTATES, THE MOST DRASTIC REMEDY THAT THIS COURT SHOULD IMPOSE IS A MODIFICATION OF THE INJUNCTION

The courts, at both the state and the federal level, are imbued with the power to modify an injunction in order to ensure that injunction both complies with the law and continues to accomplish its intended result. (*United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968); *Union Interchange, Inc. v. Savage*, 52 Cal.2d 601, 604 (1959).) Generally, a court exercises the same power over its injunctive orders

which it, as a court of equity, exercises over its other orders or decrees. (*H. G. Fenton Material Co. v. Challet*, 49 Cal.App.2d 410 (1942).) Thus, a court of equitable jurisdiction has the intrinsic or inherent power to dissolve, vacate, or modify its injunctions. (*Transportation, Inc. v. Mayflower Services, Inc.*, 769 F.2d 952 (4th Cir. 1985).) Indeed, a court's continuing power to modify a permanent injunction is an exception to the general final judgment rule. (Am.Jur.2d *Constitutional Law* § 302, citing *Wolfe v. Tuthill Corp., Full-Rite Div.*, 532 N.E.2d 1 (Ind. 1988).) Accordingly, if, notwithstanding the arguments made herein, the Court determines that any aspect of the Injunction is unconstitutional, the proper response is to modify the order as necessary.

CONCLUSION

This is not a case about stifling speech relating to "malfeasance of public officers" or any other matter with any redeeming social value as Petitioners contend. (MB 30.) It is about stopping an individual and his "hired guns" from parading around with signs that say such things as "Hey Johnnie How Much Did They Pay You To F_ _ k Me?" and "Johnnie Cochran, Esq., Your Piss Is Not Rain," in furtherance of a deliberate scheme to extort money by "creating" such a "negatively charged and ominous environment" (JA 53-54) that Cochran would pay Tory to stop.

Even Petitioners acknowledge that speech may constitutionally be enjoined in "exceptional circumstances." (MB 30.) Although there is no bright line rule for what constitutes such "exceptional circumstances," a common thread running through the cases where they are

found is that speech may be restricted where an individual's right to express himself or herself is outweighed by the potential for harm that could result from the expression. The question before the Court is whether, when this balancing test is performed, the result is that Cochran's plight is such an "exceptional circumstance." Cochran submits that it is.

Although there is no precedent for a wholesale proscription of speech about a specific person in the public forum, there is also no decision of this Court that holds that such a remedy could never be appropriate. Here, if the Court engages in the "particularized analysis" required by *Kingsley*, *supra*, the need for the Injunction (or an appropriately modified version of the Injunction) becomes apparent as does the constitutionality of the order here at issue.

Respectfully submitted,

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In The Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

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INTRODUCTION

Believing he was treated badly by prominent attorney Johnnie L. Cochran, Jr. and the legal system, Ulysses Tory exercised his First Amendment right to express his opinion in a public forum by carrying signs on a public sidewalk. Although expressing opinions about a national public figure and a matter of public concern is clearly protected by the First Amendment, the trial court issued an injunction which prevents Tory and Ruth Craft, who was not even a party to the lawsuit, from saying anything ever again about Cochran or his law firm in any public forum. This injunction is a prior restraint, which violates the First Amendment.

In an effort to avoid centuries of precedents holding that injunctions are not permissible in defamation cases and that any restriction on speech must be narrowly tailored, Cochran attempts to recharacterize this case as being about extortion and not defamation. In fact, Cochran's brief really makes just one argument: Tory was engaged in extortion unprotected by the First Amendment.

Cochran's claim of extortion is simply unsupported by the record. First, Cochran's suit was for defamation (libel, libel per se, slander and slander per se) and false light invasion of privacy. Cochran did not bring a civil cause of action for extortion; nor did he sue for harassment, intrusion, or any of the other claims he presents in his brief. Although in California, it is possible to sue for civil extortion and recover money damages, *see, e.g., Leeper v. Beltrami*, 53 Cal.2d 195, 203 (1959), Cochran presented no such claim in his complaint or at the trial court. Nor did Cochran ever file a complaint with the police alleging that Tory was engaged in extortion or even disturbing the peace, though Cochran certainly knows how to do this and the police surely would take seriously a complaint from Johnnie Cochran.

Second, contrary to the assertion in Cochran's brief, the trial court never found that Tory was engaged in extortion; indeed, the trial judge's opinion never mentions that word or anything like it. This is not surprising because nowhere at trial did Cochran claim that Tory was engaged in the crime of extortion. The trial judge's injunction was based on the erroneous conclusion that there was libel, slander, and false light invasion of privacy, the only claims Cochran raised before the trial court.

Third, the California Court of Appeal decision does not mention extortion. The Court of Appeal upheld the injunction as an appropriate remedy for defamation by erroneously concluding that permanent injunctions are not prior restraints and that permanent injunctions need not be narrowly tailored.

Thus, this case is not about, and never has been about, extortion. Rather, this case concerns whether injunctions are a permissible remedy in public figure defamation cases and, if so, whether they must be narrowly tailored. On this issue, Petitioners Tory and Craft maintain that the injunction issued by the California Superior Court, as a remedy in a defamation action, clearly violates the First Amendment.

I. THE INJUNCTION WAS IMPOSED AS A REMEDY FOR DEFAMATION OF A PUBLIC FIGURE AND NOT FOR EXTORTION, AND THUS MUST MEET THE FIRST AMENDMENT'S REQUIREMENTS FOR REMEDIES IN DEFAMATION ACTIONS.

A. The Injunction Was For Speech Protected By The First Amendment.

Cochran insists that this Court must accept the factual findings of the trial court and the Court of Appeal. But in *Bose v. Consumers Union*, 466 U.S. 485, 504, 506

n.25 (1984), this Court stressed that in a defamation action "[w]e must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression[.]" *Id.* at 508. Consistent with this fundamental precept, the Court held that "[t]he requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan*, is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11.

1. The Injunction Was Issued For The Expression Of Opinion About A Public Figure On A Matter Of Public Concern.

Cochran concedes, as he must, his status as a public figure. Respondent's Brief on the Merits (hereafter "RBM") at 46. Nor does he dispute that the statements were about the court system and the performance of an attorney and that there is an "extremely important" public interest in the conduct of lawyers. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982).

Crucially, Cochran concedes that the placards carried by "Tory and his recruits *did not contain factual information*," but instead "contained distasteful and inflammatory slogans." (RBM at 17; emphasis added). This, in itself, demonstrates the error of the lower courts. This Court repeatedly has held that statements which cannot reasonably be interpreted as asserting actual, verifiable facts about an individual are constitutionally protected opinion, especially in the context of speech concerning public figures and matters of public concern. *See Milkovich v.*

Lorain Journal Co., 497 U.S. 1, 17-21 (1990); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

All of the purported statements at issue are constitutionally protected opinion or hyperbole. For example, one of the placards on which the injunction is based innocently read, "What can I do if I don't receive the Justice the Constitution guarantees ME?" (Joint Appendix ("JA") 54.) Even taken at their worst, none of the purported statements convey verifiable assertions of fact. For instance, the alleged remarks that Cochran is unethical, has conflicts of interest or is a bad lawyer are matters of opinion.[1] An assertion that Cochran is a "crook, a liar and a thief" is not actionable because it does not convey information that can be proven true or false, as many courts have similarly held. (JA 53-54.)[2]

[1] *See, e.g., Partington v. Bugliosi*, 56 F.3d 1147, 1157-58 (9th Cir. 1995) (evaluations of a lawyer's performance are "inherently subjective" and not actionable); *James v. San Jose Mercury News, Inc.*, 17 Cal. App. 4th 1, 7-15 (Cal.Ct.App. 1993) (calling public defender an "unethical" lawyer who used "sleazy tactics" and went to "extreme lengths" to illegally obtain evidence from an alleged molestation victim's school was not actionable); *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401-1406 (Cal.Ct.App. 1999) (description of an attorney as a "loser wannabe lawyer," a "creepazoid attorney," and a "Kmart Johnnie Cochran" who files "frivolous" lawsuits and motions is not actionable); *Savage v. Pacific Gas & Elect. Co.*, 21 Cal. App. 4th 434, 444-45 (Cal.Ct.App. 1993) (accusing another of having a "conflict of interest" is not actionable)

[2] *See, e.g., Willing v. Mazzocone*, 393 A.2d 1155, 1156-58 (Pa. 1978) (striking down injunction on attorneys' former client who falsely accused attorneys of stealing her money); *Greenberg v. Burglass*, 229 So.2d 83, 84-87 (La. 1969) (lawyer who prevailed in a defamation suit after being labeled a "crook" was not entitled to a permanent injunction); *Kwass v. Kersey*, 81 S.E.2d 237, 242-47 (W.V. 1954) (rejecting an injunction prohibiting the defendant, who claimed to be a former client of plaintiff, as well as defendant's "agents, servants, employees and representatives," from "making public or circulating any libelous or slanderous statements of any kind . . . concerning the plaintiff").

2. The Injunction Was Based On Statements That Were Not Made With Actual Malice.

As an admitted public figure, Cochran must prove, with clear and convincing evidence, that the allegedly defamatory statements – which gave rise to the injunction – were published with actual malice, meaning "with 'knowledge that [they were] false or with reckless disregard of whether [they were] false or not.'" *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-57 (1986). The actual malice standard focuses solely on the defendant's subjective state of mind "at the time of publication." *Bose*, 466 U.S. at 512. This Court "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511.

Contrary to the conclusions of the trial court and the Court of Appeal, the evidence is not clear and convincing that the alleged statements in this case – even if they could be considered verifiable facts, rather than mere opinions or hyperbole – were published with knowledge of falsity or with reckless disregard for their truth or falsity.

First, Tory testified that he subjectively believed that Cochran mishandled Tory's original, underlying civil rights case.[3] Second, the evidence is not clear and convincing that Petitioners knew their demands for a refund from Cochran were based on false premises, or that they acted recklessly in demanding a refund from Cochran, even though the

[3] Reporter's Transcript of the trial proceedings in the Los Angeles County Superior Court ("RT") 174:9-17; 180:16-27; 215:16-19; 274:1-18.

money that they paid went to attorney Earl Evans, rather than to Cochran. To the contrary, a great deal of evidence indicates that Petitioners did not act with actual malice in demanding a refund from Cochran because they rationally, even if incorrectly, believed that Evans and Cochran worked as partners or agents of one another, that money paid to Evans flowed to Cochran, and that Cochran promised to refund them money.[4]

3. Cochran's Other Descriptions Of The Statements Do Not Make Them Unprotected Under The First Amendment.

Cochran colloquially labels some of Tory's purported statements "obscene" (RBM 18, 29), but they cannot be considered obscene as the Court has defined that term in the First Amendment context. *See, e.g., Cohen v. California*, 403 U.S. 15, 20 (1971) (jacket bearing a profanity is not an "obscene expression" because "such expression must be, in some significant way, erotic"). Cochran also

[4] Evans admitted that he worked in the same office as Cochran, and that he used Cochran's stationery in corresponding with Petitioners. (RT 63:4-6, 78:12-28.) Cochran testified at trial that Evans had "been with the law firm a number of years," and it was clear that Evans frequently did work for Cochran and even made court appearances in Cochran's stead. (RT 74:14-16, 78:12-25.) When Tory first approached Cochran for representation in 1983, Evans did the "intake" for Cochran and Evans counter-signed the retainer agreement on Cochran's behalf. (RT 64:8-10, 79:4-28, 117:17-118:8.) Tory testified that, from that point forward, he believed Cochran's whole firm was handling his matters, and that his later checks to Evans were to Cochran's law firm. (RT 168:4-18, 188:27-189:7.) Tory also testified that Cochran promised to recompense Tory for checks that Petitioners wrote to Evans, and that Tory's later picketing was, in part, an effort to get Cochran to acknowledge this promise. (RT 176:21-178:22, 216:6-12, 222:2-16.) Craft also testified that she heard Cochran make such a promise, and that she, too, believed Evans was part of Cochran's law firm. (RT 253:17-19, 262:14-263:2.)

calls Tory's purported statements "harassing," "bizarre," "derogatory," and "distracting" (RBM 6, 18, 38), but this Court has made clear that "vehement, caustic, and sometimes unpleasantly sharp attacks," about public figures are constitutionally protected. *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

B. The Injunction Was For Defamation And False Light Invasion Of Privacy, Not For Extortion.

The trial court based its permanent injunction on findings (albeit incorrect ones) of defamation and false light invasion of privacy. (JA 33-50.) Contrary to Cochran's repeated assertions (*e.g.*, RBM 8, 33, 35), neither the trial court nor the Court of Appeal "established," "found" or "recognized" that Tory or Craft committed extortion. In fact, the words "extort" and "extortion" do not appear in the trial court's Statement of Decision or Permanent Injunction; nor do they appear in the Court of Appeal's opinion. (JA 33-61.)

Moreover, even if Cochran had properly raised an extortion claim and the trial court had found that Tory and Craft had committed extortion, such a finding could not stand. Under California law, "extortion" is "the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear, or under color of official right." Cal. Pen. C. § 518. Extortion is only committed where the perpetrator does not have a legitimate claim to the requested property, and *knows* that he or she is not entitled to such property. *See Evans v. United States*, 504 U.S. 255, 277 (1992) (Kennedy, J., concurring) ("modern jurisprudence" requires *mens rea* for extortion); *see also United States v. Strum*, 870 F.2d 769, 774 (1st Cir. 1989) ("the term 'wrongful' requires the government to prove, in

cases involving extortion based on economic fear, that the defendant knew that he was not legally entitled to the property that he received"). As they testified at trial, Tory and Craft believe that they have a legitimate right to be reimbursed by Cochran. (RT 176:21-178:22, 216:6-12, 222:2-16, 253:17-19, 262:14-263:2.)

C. Petitioners' Alleged Motivations For Speaking About A Public Figure And A Matter Of Public Concern Do Not Affect The First Amendment Protection For Such Speech.

Speech that has properly been ruled extortionate is not protected by the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (Stevens, J., concurring). But not all speech that is designed to pressure the listener or change the listener's conduct to benefit the speaker is unprotected extortionate speech. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 264 (Souter, J., concurring) (1994) ("Conduct alleged to . . . [be] extortion . . . may turn out to be fully protected First Amendment activity"); *see also United States v. Jackson*, 180 F.3d 55, 67 (2d Cir. 1999) ("plainly not all threats to engage in speech that will have the effect of damaging another person's reputation, even if a forbearance from speaking is conditioned on the payment of money, are wrongful").

This Court's decision in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), is illustrative. In *Keefe*, a trial court enjoined the future speech of the petitioners, an organization of residents that had been distributing leaflets critical of the respondent in response to the respondent's refusal to sign an agreement not to solicit property in the organization's neighborhood. *Id.* at 415-17. The appellate court affirmed the injunction on the ground that the petitioners' leafleting activities were "coercive and intimidating," invasive of respondent's

privacy and therefore "not entitled to First Amendment protection." *Id.* at 418. This Court reversed, explaining that "the claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper." *Id.* at 419 (citations omitted). The Court went on to state, in words that are exactly on point for this case, that "[no] prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Id.*

Similarly, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court was clear that speech seeking to pressure economic behavior is protected by the First Amendment. *Claiborne Hardware* involved an injunction designed to end an economic boycott, where "Petitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism." *Id.* at 909-10. This Court invalidated the injunction, ruling that "speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action;" indeed "'offensive' and 'coercive' speech" is "protected by the First Amendment." *Id.* at 910-11.

Even if Petitioners' motives in criticizing the professionalism and ethics of a prominent public figure such as Cochran could be considered offensive, coercive or otherwise questionable, Petitioners' criticisms are still entitled to constitutional protection. *See Hustler Magazine*, 485 U.S. at 53 ("in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment").

II. THE PERMANENT INJUNCTION IS A PRIOR RESTRAINT.

Cochran concedes that there is a "heavy presumption" against the "constitutional validity" of a prior restraint. (RBM 20-21). Nevertheless, Cochran contends that the injunction in this case is not a prior restraint. (RBM 20-31.)

Cochran confuses two questions: whether Tory's past speech is protected and whether the restriction of future speech is a prior restraint. Even if Tory's past speech was not protected, the injunction is still a prior restraint because it restricts future speech and because it requires judicial approval before any future speech occurs. (JA 33-34.)

Cochran contends that the injunction is merely a "subsequent punishment" for Tory's past speech and thus not a prior restraint. (RBM 28-29.) But this assertion is undermined by this Court's unequivocal statement in *Alexander v. United States*, 509 U.S. 544, 550 (1993), that "permanent injunctions ... that actually forbid speech activities are classic examples of prior restraints" because they impose a "true restraint on future speech."

It is telling that Cochran cites no authority for the proposition that a permanent injunction on speech is a "subsequent punishment," save the Court of Appeal's opinion being challenged in this case. (RBM 29 (citing JA 56).) It is not surprising that Cochran could find no authority to support his position because, as Justice Scalia observed, "I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment should be the sanction for misconduct." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 794 n.1 (1994) (Scalia, J., concurring in judgment in part and dissenting in part).

III. INJUNCTIVE RELIEF IS NOT A PERMISSIBLE REMEDY IN A DEFAMATION CASE.

Cochran sued Tory for defamation (libel, libel per se, slander and slander per se) and false light invasion of privacy based on the same set of alleged facts. (JA 7, 13-17.) A false light invasion of privacy claim based on the same facts as a defamation claim must meet the same constitutional standards as the defamation claim. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). In California, "[w]hen claims for [false light invasion of privacy] ... are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed." *Couch v. San Juan Unified Sch. Dist.*, 33 Cal. App. 4th 1491, 1504 (1995). Contrary to Cochran's repeated suggestions and implications (*e.g.*, RBM 8, 35), he made no other type of privacy claim, nor did he make any claim for harassment or extortion. Thus, despite Cochran's many attempts to recast the nature of this dispute, it is, fundamentally, a defamation case.

A. Cochran Concedes That Prior Restraints Have Historically Been Rejected In Defamation Cases.

Cochran concedes that "in the eighteenth, nineteenth and early twentieth centuries, the 'traditional rule ... that equity has no jurisdiction to enjoin a libel' was often applied[.]" (RBM 35.) Notwithstanding this concession, Cochran reads *Near v. Minnesota*, 283 U.S. 697 (1931), and *Keefe* to permit injunctions to "redress individual or private wrongs." (RBM 25). *Near* and *Keefe* cannot be read as narrowly as Cochran contends. *Near* emphatically rejected the notion that injunctive relief is ever a permissible remedy in defamation cases, calling it the "essence of censorship," even though the injunction in that case followed a finding of defamation and involved false and

anti-Semitic epithets – speech of minimal, if any, public value. *Near*, 283 U.S. at 704-06, 713-18.

Even if *Near* and *Keefe* could be read as narrowly as Cochran suggests, the speech in this case is not merely a matter of private concern, but instead addresses matters of public concern: the professional conduct of Cochran, a prominent attorney and admitted public figure, and Petitioners' experiences in the legal system. (*See* Petitioner's Brief on the Merits (hereafter "PBM") at 11-13.)

Cochran does not – because he cannot – dispute that this Court has never upheld an injunction in a defamation case. Instead, Cochran cites cases that did not involve defamation. (RBM 21-23, 27-28, 30-34). *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973), *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957), and *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 49 (1961), all involved narrow injunctions of material that courts had previously adjudged obscene. *See Near*, 283 U.S. at 716 (prior restraints are allowed only in "exceptional cases," such as enjoining obscenity.)

This case is also very different from *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973), which involved a "narrowly drawn" rule prohibiting advertising of illegal activity, not a court injunction of speech. Again, in *Pittsburgh Press* the Court distinguished and "reaffirm[ed] unequivocally" *Near*'s rule, which does not allow injunctions on the "free expression of views . . . however controversial." *Id.*

B. Damages Are The Appropriate Remedy In Defamation Cases.

Cochran makes no effort to address the ample authority presented by Petitioners holding that damages are a sufficient remedy for plaintiffs in defamation cases. (*See* PBM 23-26.) Cochran also does not contend that damages

would have been an inadequate remedy in this case.[5] Instead, Cochran again turns to inapposite authority to suggest that his remedy is "not limited to damages." (RBM 34-37.)

Cochran's reference to injunctions in privacy cases is misplaced because neither decision cited by Cochran involved an injunction based on false light invasion of privacy, which is the only type of privacy claim at issue in this case. (RBM 35) Even if Cochran had advanced some other brand of privacy claim – which he clearly did not – the instant injunction still could not stand. *See Keefe*, 402 U.S. at 419-20 (injunction to prevent the peaceful distribution of literature critical of an individual's business practices was unconstitutional even though the conduct was alleged to be an "invasion of privacy").

Cochran's reliance on labor picketing cases is equally misplaced because the labor context has consistently been treated distinctly by this Court. (RBM 35-36.) In *American Steel Foundries v. TriCity Central Trades Council*, 257 U.S. 184, 205-06 (1921) – a case that pre-dates *Near* – this Court recognized the particular problems attendant to "strikers and sympathizers engaged in the economic struggle," especially where "one or more assaults or disturbances ensued" creating an "intimidating" atmosphere. *Id.* at 205. Cochran also cites to *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983), but in that case the trial court "declined to enjoin the distribution" of the allegedly libelous leaflets. *Id.* at 734. The final labor case cited by Cochran, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 309

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[5] Cochran waived his right to seek damages, and he conceded that he did not actually suffer any damages. (JA 37-38; RT 55:20-28; Reporter's Transcript of trial court proceedings on April 24, 2002, at 2:7-10.)

n.16 (1979), addressed the special nature of direct appeals by labor to consumers, but it did not explicitly permit injunctions even in that context. Moreover, this Court specifically acknowledged that such a circumstance is distinct from defamation claims. *Id.*

Finally, without the benefit of any authority, Cochran wrongly contends that his remedy is not limited to damages because he is entitled to an injunction because of the purported "ongoing extortion attempts recognized by the trial court." (RBM 35.)[6] As discussed above, this case is not about extortion, and the trial court never recognized any attempted or consummated extortion. (JA 33-50.) Moreover, crimes, such as extortion, cannot be enjoined. *See generally New York Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring) ("it is a traditional axiom that equity will not enjoin the commission of a crime"). Instead, perpetrators of extortion may be criminally prosecuted. In California, it is possible to sue for civil extortion and recover money damages, *see, e.g., Leeper v. Beltrami*, 53 Cal.2d 195, 203 (1959), but Cochran never brought such a claim.

C. Injunctions Are Not An Appropriate Remedy In Defamation Cases.

In their Brief on the Merits, Petitioners explain why an injunction in a defamation case can never be crafted in a fashion consistent with the First Amendment: any effective

[6] The one case cited by Cochran to support his position, *United States v. Sasso*, 215 F.3d 283 (2d Cir. 2000), did not approve an injunction to prevent extortion. (RBM 35.) Rather, the court only noted in passing that the government had commenced a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, and had included in one paragraph a request to enjoin an allegedly corrupt labor union's and "organized crime's extortion of construction businesses." *Id.* at 285.

injunction will be overbroad and any limited injunction will be ineffective. (PBM 26-29.) Put another way, any injunction in a defamation case will always be either under-inclusive or over-inclusive, and it will never be narrowly tailored, as the law requires. Cochran defends the scope of the injunction by championing its clarity. (RBM 38.) Petitioners agree that the injunction is painfully clear – it clearly prevents, as Cochran puts it, "all discussion about Cochran" in any public forum. (RBM 37.) Petitioners do not object to the injunction on clarity or vagueness grounds, but instead challenge its unconstitutional overbreadth. The regulation in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), which prohibited all "First Amendment activities" at airports in Los Angeles, was also clear; but, as this Court held, it was unconstitutionally overbroad. *Id.* at 574-75. Clarity is no defense to unconstitutional overbreadth.

IV. EVEN IF INJUNCTIONS ARE ALLOWED IN DEFAMATION CASES, SUCH INJUNCTIONS MUST BE NARROWLY TAILORED; BUT THE INJUNCTION IN THIS CASE IS UNCONSTITUTIONALLY OVERBROAD.

A. The Permanent Injunction Is Content-Based Because, As Respondent Concedes, It Bars Discussion On The "Subject" Of Johnnie Cochran.

Cochran argues that the injunction is content-neutral because it "does not distinguish between 'good' and 'bad' expression about Cochran; any public communication on the *subject* of Cochran is prohibited." (RBM 9 (emphasis added); *see also* RBM 42 ("Petitioners are as much in violation of the Injunction if they publicly praise Cochran as if they publicly criticize him").) He is mistaken because the "First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints,

but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980). *See also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its *subject matter*, or its content") (emphasis added).

This Court disapproved an argument, nearly identical to Cochran's, in *Carey v. Brown*, 447 U.S. 455 (1980). *Carey* involved an ordinance which prohibited picketing in residential neighborhoods, except for labor protests related to a place of employment. This Court invalidated the law, explaining that "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," and it is "of course, no answer to assert that the . . . statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message." *Id.* at 462 & n.6.

Cochran relies on several inapposite decisions that did not involve restrictions on speech based on viewpoint or subject matter. (RBM 39-43.) In *Madsen v. Women's Health Center*, 512 U.S. at 763, for example, this Court upheld an injunction establishing a buffer zone around abortion clinics, concluding that such an injunction applied regardless of viewpoint or subject matter, even if it had a disproportionate impact on individuals, anti-abortion protestors, expressing a particular viewpoint. Here, unlike in *Madsen*, no one disputes that the purpose of the injunction is to stymie discussion on a particular subject matter. Therefore if the injunction is to be permitted at all, it "must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of public order." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).

B. The Permanent Injunction In This Case Is Enormously Overbroad.

Even if the Court determines that the injunction is content-neutral, it still must "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765.

The injunction is tremendously overbroad. Even Cochran describes the injunction as a "wholesale proscription of speech about a specific person in the public forum." (RBM 48.) The injunction is "wholesale," as Cochran puts it, because it prohibits all forms of protected speech about Cochran and his law firm, including opinions, true statements of fact and praising speech. It applies to "any" "utterance" – from organized picketing to a whisper in the park – in "any public forum". (JA 34). The injunction applies to all of Tory's "agents" including Craft, who was never given an opportunity to defend herself at trial. Even this brief violates the terms of the injunction because it is written by Tory's agents and will be communicated in public forums.

Cochran's only defense to the staggering scope of the injunction is that it applies only in public forums. (RBM 45.) This is really no limitation at all. Public forums – such as the public areas around Cochran's office and the Los Angeles Superior Court, which are specifically mentioned in the injunction (JA 34) – "occup[y] a special position in terms of First Amendment protection." *United States v. Grace*, 461 U.S. 171, 180 (1983).

Cochran does not advance any countervailing government interest that is "compelling" – or even "significant" – enough to warrant overlooking the dramatic breadth of the injunction. Cochran invokes his business and privacy interests (RBM 43-44), but this Court has acknowledged that, even where a plaintiff asserts that speech has invaded his privacy and damaged his business,

there is no authority supporting injunctive relief. *Keefe*, 402 U.S. at 419 (rejecting an injunction on speech based on a claimed "invasion of privacy"). Moreover, Cochran and the trial court acknowledged that Cochran was not actually damaged at all. (RT 55:20-28; JA 37-38.)

Cochran also argues that the injunction helps protect the integrity of the legal profession. (RBM 44.) There is, however, a higher interest in allowing criticism of the legal profession, and its most prominent members, in order to expose flaws in the system and deficient practitioners. *See Cochran v. NYP Holdings, Inc.*, 210 F.3d 1036, 1038 (9th Cir. 2000) (holding that an article that was highly critical of Johnnie Cochran and his handling of the famous O.J. Simpson case was protected opinion).

Finally, Cochran contends that there is an overriding interest in preventing crime. (RBM 44). But there was no crime committed in this case. Tory was never arrested or charged with any crime. Cochran acknowledged as much at trial when he testified: "*If* you had broken the law, Mr. Tory, I'm sure you would have been arrested." (RT 61:22-23 (emphasis added).)

C. The Court Should Declare The Injunction Unconstitutional, Not Rewrite It.

Cochran asserts that the "only" effective remedy in this case is to proscribe "*all* discussion about Cochran by Petitioners in the public forum." (RBM 37 (emphasis in original).) Nevertheless, Cochran asks this Court, as an alternative, "to modify the order as necessary," but he does not articulate how the order could or should be modified. The Court should not entertain Cochran's suggestion.

First, as discussed above, the injunction is predicated on speech that is – and should have been deemed – constitutionally protected. Tory never should have been held

liable for defamation or false light invasion of privacy for expressing opinions about a public figure in a public forum, and Craft – who was never a defendant – should not have been named in the injunction.

Second, injunctions are not permissible as remedies in defamation actions. Centuries of precedent, dating back to English law before the existence of the United States, establish that equitable relief is not available in defamation cases. *See, e.g.*, Rodney Smolla, *Law of Defamation* § 9:85 (2d ed. 2004); Michael Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers*, 34 Ind. L. Rev. 295, 308-311, 324-330 (2001).

Third, modifying the injunction would be an extraordinary measure never before undertaken by this Court. Cochran cites no authority, because there is none, where this Court ever upheld an injunction of speech by rewriting it. *See, e.g., United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 581 (1971) (striking down an injunction because "upon its face it abridges rights guaranteed by the Constitution.")

Finally, rewriting the injunction is inappropriate because no limitation could satisfy First Amendment standards. In *Board of Airport Comm'rs*, 482 U.S. at 575-76, this Court declined to narrow an overbroad regulation prohibiting "all First Amendment activities," because ever. a modified version of such a rule would violate the First Amendment. The same is true here. As Petitioners have explained, there is not a way to craft an injunction in defamation cases that would meet First Amendment scrutiny.

CONCLUSION

Never in American history has this Court upheld a permanent injunction as a remedy in a defamation action. Upholding the injunction in this case would dramatically change the law and open the door to broad injunctions of speech as a routine matter in defamation cases across the country. This Court should follow its unbroken line of authority since *Near v. Minnesota* and overturn the injunction which prevents Tory and Craft from ever saying anything about Cochran or his law firm in any public forum.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ULYSSES TORY, *et al.*,
Petitioners,

v.

JOHNNIE COCHRAN, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations, a federation of 60 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of Petitioners with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In this defamation case, the courts below—based on their ruling that Ulysses Tory had made libelous and slanderous statements concerning Johnnie Cochran—issued a broad injunction barring Tory from making any public statements concerning Cochran. That injunction—which prohibits Tory from making statements concerning Cochran that have not been found to be defamatory and constitutionally unprotected and, indeed, prohibits Tory from making statements concerning Cochran that would be constitutionally protected—is clearly an unconstitutional prior restraint on speech. Such an injunction cannot rest on the defendant's prior publication of defamatory statements. Under *Near v. Minnesota*, 283 U.S. 697 (1931), injunctions suppressing speech cannot be justified on the ground that the defendant had previously engaged in unprotected speech.

It does not follow, however, that every defamation case injunction restraining speech constitutes an impermissible prior restraint. As suggested by the *Restatement (Second) of Torts*, vol. 3, p. 329 (1977), "a carefully worded injunction . . . against further publication of [a] statement that has already been determined by the court to be false and defamatory" and unprotected by the First Amendment would not constitute a prior restraint on speech. Such an injunction would prohibit only republication of statements that the court had formally determined after the fact to be defamatory and unprotected.

No broader injunction, however, would be consistent with the First Amendment. To pass constitutional muster, a defamation case injunction must be limited to barring *only* "the repetition of specifically identified prior statements that had been finally determined to [be] libelous." *Metropolitan Opera Association v. Local 100, Hotel Employees and Restaurant Employees*, 239 F.3d 172, 178 (2d Cir. 2001).

The injunction here can not pass that muster and the judgment below sustaining that injunction is due to be reversed.

ARGUMENT

In this defamation case brought by Johnnie Cochran, a prominent California lawyer, the courts below ruled that the defendant Ulysses Tory had made "pervasive use of libelous and slanderous statements" concerning Cochran. Pet. App. A7. On that basis, those courts "permanently enjoined" Tory and "all persons acting in concert, cooperation or participation with him" from "displaying signs, placards or other written or printed material about Cochran and/or Cochran's law firm" and from "orally uttering statements about Cochran and/or Cochran's law firm" in "any public forum." *Id.* at A13.[2]

That defamation case injunction offends the First Amendment. While the Constitution does not bar a defamation case court from issuing a precisely framed injunction against the defendant's republication of the particular statements about the plaintiff the court has found to be defamatory and unprotected by the First Amendment, a broadly gauged injunction against the defendant's publication of statements about the plaintiff generally is an unconstitutional prior restraint on speech.

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[2] The courts below also permanently enjoined Tory and all persons acting in concert with him from "[s]tanding, assembling or approaching within three hundred (300) yards of (i) Cochran[] or (ii) Cochran's place of business" and from "[c]ontracting, harassing, threatening, stalking, disturbing the peace of, keeping under surveillance or blocking the movements of Cochran." Pet. App. A13. Because the foregoing injunctive provisions have not been challenged here, we do not address whether these provisions—which unlike the challenged provision are *not* content-based restrictions on speech—"burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994).

1. In *Crosby v. Bradstreet Co.*, 312 F.2d 483, 484 (2d Cir. 1963), the Second Circuit considered the constitutionality of a defamation case injunction like the injunction here, *viz.*, an injunction requiring a defamation defendant to "refrain from issuing or publishing any report, comment or statement either in writing or otherwise concerning [named persons] or concerning the business activities of any of the foregoing persons." What the Second Circuit said in vacating that injunction applies fully to the injunction in this case:

> "Such an injunction, enforceable through the contempt power, constitutes a prior restraint . . . against the publication of facts which the community has a right to know and which [the defendant] had and has the right to publish" and is "in violation of the First Amendment to the Constitution." *Id.* at 485.

The *Crosby* Court could not have been more correct. "[C]ourt orders that actually forbid speech activities" are "classic examples of prior restraints," *Alexander v. United States*, 509 U.S. 544, 550 (1993), and such restraints "are the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976). As this Court has emphasized, "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 390 (1973).

A broadly gauged injunction against the future publication of statements about a third party generally by a defendant who has published defamatory and untrue statements in the past—no less than such an injunction against a defendant who has not published such statements—is an impermissible prior restraint. "The special vice of [such an injunction] is that communication will be suppressed . . . before an adequate determination that [the communication] is unprotected by the First Amendment." *Pittsburgh Press*, 413 U.S. at 390.

Indeed, the whole point of such an injunction is to suppress the defamation case defendant's future publication of any statement about the plaintiff without regard to whether the suppressed statement would be protected by the First Amendment, i.e., without regard to whether the statement would constitute "the publication of facts which the community has a right to know and which [the defendant] had and has the right to publish." *Crosby*, 312 F.2d at 485.

Such a broadly gauged injunction cannot rest on the defendant's prior publication of defamatory statements. This Court has repeatedly held that injunctions suppressing speech cannot be justified on the ground that the defendant had previously engaged in unprotected speech. In *Near v. Minnesota*, 283 U.S. 697, 713 (1931), the Court held that a newspaper's prior publication of "scandalous and defamatory matter" did not justify "censorship" of its future publications. In *Vance v. Universal Amusement Co.*, 445 U.S. 308, 311 (1980), moreover, the Court sustained a lower court decision applying *Near* to invalidate "statutes authoriz[ing] state judges, on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been found to be obscene." *See also Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (explaining that the Minnesota statute in *Near* was unconstitutional because it "empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive," and sustaining the New York statute in *Kingsley Books* on the ground that "it studiously withholds restraint upon matters not already published and not yet found to be offensive").

2. This is not to say that every defamation case injunction restraining speech constitutes an unconstitutional prior restraint. To the contrary, we believe that the following suggestion in the "Special Note on Remedies for Defamation Other than Damages" to chapter 27 of the *Restatement*

(Second) of Torts, vol. 3, p. 329 (1977), is consistent with the First Amendment:

> "When it has been formally determined by a court that a statement is both defamatory and untrue and the defendant persists in continuing to publish it, a carefully worded injunction might meet the need and be available against further publication of the statement that has already been determined by the court to be false and defamatory."

A "formal[] determin[ation] by a court that a statement is both defamatory and untrue," *Restatement*, vol. 3, p. 329, is "an adequate [after-the-fact] determination that [the statement] is unprotected by the First Amendment," *Pittsburgh Press*, 413 U.S. at 390. Thus, a "carefully worded injunction" that applies only to "further publication of the statement that has already been determined by the court to be false and defamatory," *Restatement*, vol. 3, p. 329, and unprotected by the First Amendment, cannot be denominated a prior restraint on speech. Such an injunction, moreover, meets the requirement that any "order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).

The salient point, as stated by the First Circuit in *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993), is this:

> "An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint."

This sound formulation of the constitutional rule carries with it two limitations that go to the essence and that are worthy of emphasis.

First, a defamation case injunction that is *not* narrowly limited to barring only "the repetition of specifically identified prior statements that had been finally determined to [be] libelous" *is* an unconstitutional prior restraint. *Metropolitan Opera Association v. Local 100, Hotel Employees and Restaurant Employees*, 239 F.3d 172, 178 (2d Cir. 2001).

In the *Metropolitan Opera* case, the district court found that HERE Local 100 defamed the Met by falsely suggesting that the Opera was engaged in a primary labor dispute with the Union. On this basis, the district court issued a preliminary "injunction prohibit[ing] the Union and its members generally from 'threatening or harassing' and 'engaging in fraudulent or defamatory representations regarding' the Met, its donors, officers, patrons or directors." 239 F.3d at 174.

The Second Circuit distinguished an "injunction against the repetition of specifically identified prior statements that had been finally determined to [be] libelous" from the injunction issued by the district court on the ground that the district court's "injunction is vague as to what the Union may say and what statements might lead to a finding of contempt of court." *Metropolitan Opera*, 239 F.3d at 178. This vagueness "put[] the Union at risk of punishment for good faith efforts to advocate publicly its position" and left the Union "no way of determining from the text of the injunction whether other chants or statements in the future will lead to further contempt sanctions." *Id.* For that reason, the Second Circuit concluded that "the vagueness of this injunction serve[d] as sufficient reason to require that we vacate it." *Id.*

"As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Thus, as the *Metropolitan Opera* court appreciated, an injunction against "defamatory statements" in general or even "defamatory statements of a similar nature"

to statements that have been found defamatory would create an intolerable risk that protected "communication will be suppressed . . . by inducing excessive caution in the speaker." *Pittsburgh Press*, 413 U.S. at 390.

Second, the necessary initial predicate to the issuance of a "narrowly tailored" injunction prohibiting only speech that has been "finally adjudicat[ed] on the merits" to be defamatory and unprotected, *Carpenter*, 8 F.3d at 903, is a "formal[] determin[ation] by a court that [the enjoined] statement is both defamatory and untrue," *Restatement*, vol. 3, p. 329, and unprotected by the First Amendment. The courts below did *not* make any such "formal determinations" regarding the particular statements published by Tory.

The trial court decision does quote 13 statements published by Tory on placards. Pet. App. A20 ¶ 16. But the majority of these statements—for example, "You've been a BAD, BAD boy Johnnie Cochran" and "Attorney Cochran, Don't We Deserve the Same Justice as O.J.?"—are not statements of fact that are subject to being adjudicated defamatory and untrue. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974). Beyond these, the trial court generally characterizes other statements, that it does not quote, as being "untrue, misleading and malicious." Pet. App. A20-A21 ¶18.

To "show[] that Tory 'crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact,'" Pet. App. A 9, quoting *San Antonio Hospital v. Southern California Council of Carpenters*, 125 F.3d 1230, 1237 (9th Cir. 1997), the court of appeal, in its turn, cited the following three statements:

> "'Hey, Johnnie, how much did they pay $$ you to f--- me?' and 'Johnnie Cochran, I know what you, the County and City did to my case,' and 'Johnnie is a crook, a liar and a thief.'" *Id.*

However, as Judge Kozinski put it in his *San Antonio Hospital* dissent, these statements reflect nothing worse than

"ambiguity and flamboyance," 125 F.3d at 1240, and cannot be taken as malicious misstatements of fact subject to condemnation as defamatory. Indeed, "the *settings* of the speech in question . . . makes their hyperbolic nature apparent." *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994). These three statements were contained on placards displayed in conjunction with other placards conveying obviously hyperbolic assertions about Cochran. "In such a heated and volatile setting, even seemingly 'factual' statements take on an appearance more closely resembling opinion than objective fact." *Steam Press Holdings v. Hawaii Teamsters*, 302 F.3d 998, 1006 (9th Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003).

The decisions below, thus, do not even come close to establishing the necessary initial predicate for a "narrowly tailored" injunction against "a continuing course of repetitive speech" that has been "finally adjudicat[ed] on the merits" to be defamatory and unprotected. *Carpenter*, 8 F.3d at 903. There has been no "formal[] determin[ation] by a court that [any particular enjoined] statement is both defamatory and untrue," *Restatement*, vol. 3, p. 329, and unprotected by the First Amendment. Indeed, many of the statements quoted by the lower courts and condemned as defamatory in general terms did not entail, even by implication, any factual assertion whatsoever. And, those few statements that, in isolation, might be understood to imply untrue factual assertions, could not, in context, be so understood.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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Case No. 03-1488

In The

Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ of Certiorari To The Court of Appeal of the State of California, Second Appellate District, Division One

BRIEF AMICI CURIAE OF HISTORIANS ALFRED L. BROPHY, PAUL FINKELMAN, KERMIT L. HALL, MICHAEL I. MEYERSON AND STEPHEN A. SIEGEL IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Amici are professors and scholars who teach and write about American and English legal history and are knowledgeable about the history of the freedom of the press in America. They are Alfred L. Brophy, Paul Finkelman, Kermit L. Hall, Michael I. Meyerson, and Stephen Siegel. A summary of the qualifications and affiliations of the individual amici is provided in the appendix to this brief. Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Cochran v. Tory*, 2003 Cal. App. Unpub. LEXIS 10227, B159437 (Cal. Ct App. 2nd App. Dist.) (2003), petition for review denied 2004 Cal. LEXIS 751 (Cal. 2004), the court imposed an extraordinary remedy in a defamation action: A speaker, Ulysses Tory, was permanently enjoined from ever discussing his former attorney, Johnnie Cochran, in public. The relevant part of the

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have filed blanket consent to the filing of amici briefs. Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the amici curiae or their counsel, has made a monetary contribution to the preparation or submission of this brief.

> [i]n any public forum, including, but not limited to, the Los Angeles Superior Court and any other place at which Cochran appears for the purpose of practicing law: (i) picketing Cochran [or] Cochran's law firm; (ii) displaying signs, placards or other written or printed material about Cochran [or] Cochran's law firm; (iii) orally uttering statements about Cochran [or] Cochran's law firm.... Joint Appendix (J.A.) 56.

The only Supreme Court case directly addressing the issue of enjoining defamatory statements, *Near v Minnesota*, 283 U.S. 697, 701 (1931), held that a statute permitting an injunction against further publication of a "malicious, scandalous and defamatory newspaper" was an unconstitutional prior restraint. Although that decision provided only a brief historical summary to support its holding, a detailed historical study reveals that the Court's analysis was indeed correct.

Amici, as legal historians, believe they can serve the Court by exploring the history of the prior restraint doctrine in both England and the United States, and showing that the use of injunctions as a remedy in defamation actions, such as that imposed on Ulysses Tory, violates the principles of the freedom of expression as understood in England prior to the American

Revolution, in America at the time of the drafting of the First Amendment, and throughout American history. In fact, by the second half of the Eighteenth Century, there was a consensus in both England and America that a ban on enjoining defamatory speech was an essential component of freedom of expression. Such injunctions were seen as one type of improper "prior restraint".

The development of the doctrine of prior restraint can best be understood as a product of four distinct strands: 1) the history of licensing of the press; 2) the historical prohibition on enjoining defamatory statements; 3) the English and colonial distrust of judges; and 4) American development of the English and Colonial traditions. Together, they created the foundation for much of our understanding of the meaning of freedom of speech and of the press.

ARGUMENT

I.

AT THE TIME OF THE AMERICAN REVOLUTION, FREEDOM OF THE PRESS WAS UNDERSTOOD IN ENGLAND TO PROHIBIT INJUNCTIONS AS A REMEDY IN DEFAMATION ACTIONS

A. The Development of the Ban on Licensing Printing

In 1530, King Henry VIII issued a proclamation, mandating that no religious book be printed until it had first been "examyned and approued by the ordinary of the diocese." Fred S. Siebert, Freedom of the Press in England 1476-1776: The Rise and Decline of Government Control 46 (1965). In 1538, a new proclamation was issued, Proclamation Antiquity 2 (97), which instituted the first comprehensive licensing system. *Id.* at 48-49. Religious books were still to be licensed by bishops, but all others needed the approval of members of King Henry VIII's Privy Council. The penalty for unauthorized publication included loss of property, fine, or imprisonment.

While the licensing law was revised in 1546 and in 1559, the next major step in the regulation of printing occurred in 1586,

when that emblem of oppression, the Star Chamber, issued a decree which regulated every aspect of printing. *Id.* at 68-74. All printers were required to register their presses with the Stationers Company, the royally-authorized organization of printers and writers, and receive a license prior to the publication of any work. The number of printers was strictly limited, and violators of Stationers Company rules could face both a fine and destruction of their printing.

A second Star Chamber decree, in 1637, reiterated and expanded the licensing requirement. The difficulty of enforcing these requirements was bemoaned by the Star Chamber itself, which stated that:

> divers abuses have . . . beene practised by the craft and malice of wicked and evill disposed persons, to the prejudice of the publike; And divers libellous, seditious, and mutinous bookes have beene unduly printed, and other bookes and papers without licence, to the disturbance of the peace of the Church and State. *Star Chamber Decree of 1637, reprinted in* 2 Complete Prose Works of John Milton 793 (1959).

The end of the unpopular Star Chamber, which occurred on July 5, 1641, did not mean the end to restraints on the press. On

June 14, 1643, a new licensing law was enacted. This time, it was the Parliament that was to serve as censor. In its order, Parliament noted "the great late abuses and frequent disorders in Printing many false forged, scandalous, seditious, libellous, and unlicensed Papers, Pamphlets, and Books to the great defamation of Religion and government." Licensing Order of June 14, 1643, *reprinted in* 2 Complete Prose Works of John Milton 797 (1959). Under Parliament's new order, all books and pamphlets had to be approved by licensors appointed by either the House of Commons or the House of Lords.

At about this time, intellectuals began to expound on the need for freedom from prior review as an indispensable ingredient for a free society and a free press. In 1644, John Milton published *Areopagitica*, *reprinted in* 2 Complete Prose Works of John Milton at 485-570 (1959). Milton was willing to concede that if printers published scandalous or seditious work, the Government should "confine, imprison, and do sharpest justice on them as malefactors." But, licensing, according to Milton, created a special and intolerable harm by preventing books from being published at all. Prior to the imposition of licensing:

> [b]ooks were ever as freely admitted into the World as any other birth; the issue of the brain was no more stifl'd then the issue of the womb . . . if it prov'd a Monster, who denies, but that it was justly burnt, or sunk into the Sea. But that a Book in wors condition then a peccant soul, should be to stand before a Jury ere it be borne to the World, and undergo yet in darknesse the judgement of *Radamanth* and his Collegues [the mythical judges of Hades], ere it can passe the ferry backward into light, was never heard before ....

Another aspect of licensing that haunted Milton was his view that prior suppression of a work robbed humanity of its ideas for all time. Milton said, "who kills a Man kills a reasonable creature, Gods Image; but hee who destroyes a good Booke, kills reason it selfe, kills the Image of God, as it were in the eye[,] . . . slaies an immortality rather then a life."

In spite of such arguments, licensing continued for most of the Seventeenth Century. New laws were passed in 1647 and 1662. *See* James Paterson, The Liberty of the Press, Speech, and Public Worship 45-46 (1880). In 1679, the licensing statute expired, but English judges ruled that the Crown could license publications even without statutory authority. In a 1680 trial for the crime of publishing a weekly newspaper without a license, the recorder for

the court, George Jeffreys, stated that, "it is the opinion of all the judges of England that it is the law of the land, that no person should offer to expose to public knowledge any thing that concerns the government, without the king's immediate license." *The Trial of Henry Carr, or Care, at the Guildhall of London, For a Libel: 32 Charles II. A.D. 1680, in* 7 Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time 1111, 1115 (1810).

Parliament, however, was not content to rely on such judicial reasoning, and passed licensing acts in 1685 and again in 1692. The 1692 Act expired by its own terms in 1695. Although the House of Lords voted to renew the law, the House of Commons refused. The reasons given for permitting the licensing law to lapse were far more practical than philosophical. *See* H.L. JOUR., XV, 545-46 (April 18, 1695). The House of Commons complained that, while the Licensing Act banned "offensive" works, it supplied no test for offensiveness. Moreover, because the Act did not specify the penalty for violations, judges were free to impose arbitrary and excessive penalties. There were also

complaints that the licensing system was ineffective in stopping scurrilous books, that poorly paid licensors were frequently bribed, and that the special privileges and protections of law were granted to a favored few. Interestingly, the House of Commons did not argue that the press should be free to criticize the Government, or even that licensing was destructive of freedom. In the words of British historian Lord T.B. Macaulay, "on the great question of principle, on the question whether liberty of unlicensed printing be, on the whole, a blessing or a curse to society, not a word is said." T.B. Macaulay, III, History of England 328 (1906).

Nonetheless, the expiration of the Licensing Act quickly became viewed as a monumental victory for freedom of the press. In 1701, Daniel Defoe described the "tyranny of a Licenser" as one of the great burdens ever to have been imposed on the press, and credited the English Government with the wisdom to end this evil:

> This, in all Ages, has been a method so ill, so arbitrary and so subjected to bribery and Parties, that the Government has thought fit, in justice to the Learned Part of the World, not to suffer it; since it has always been shutting up the Press to one side, and opening it to the other; which, as Affairs are in

> England often changing, has, in its turn, been oppressive to both. Daniel Defoe, "The True Born Englishman" (1703), *reprinted in* Later Stuart Tracts 110 (1964).

B. The Development of the Refusal to Enjoin Defamatory Statements

A similar evolution in understanding occurred in England concerning the rule that libel and slander were offenses that could only be punished, but could not be prevented. By the time of the American Revolution, it was generally understood that this rule was an essential element in preserving freedom of expression. *See generally* Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 308-312 (2001).

There were several different roots to the English law of defamation. During the Thirteenth and Fourteenth Centuries, defamatory statements generally were considered to be matters for religious tribunals, and the ecclesiastical courts heard many cases involving imputations of crimes and sexual immorality. *See, e.g.*,

R.C. Donnelly, *History of Defamation*, 1949 Wis. L. Rev. 99, 100-03. Eventually, though, the Star Chamber took over the trial of cases involving libel. Early in the 1600s, the Star Chamber declared that libel was a criminal offense because it tended to cause breaches of the peace, and if the libel was "against a magistrate, or other public person, it is a greater offence." Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 565 (1903) (quoting De Libellis Famois, 5 Co. Rep. 125 (1606)). The Star Chamber's penalties for those found guilty of libel were harsh:

> [A] libeller shall be punished either by indictment at the common law, or by bill, if he deny it, or *ore tenus* on his confession in the Star Chamber, and according to the quality of the offence he may be punished by fine or imprisonment, and if the case be exorbitant, by pillory and loss of his ears . . . .

There was no possible protection from a jury of one's peers. The Star Chamber ruled alone on both questions of law and fact. *See, e.g.*, 2 James Fitzjames Stephen, A History of the Criminal Law of England 308-09 (1883).

At the same time, the common-law courts were wresting

jurisdiction away from the ecclesiastical courts and claiming jurisdiction over defamations which caused "temporal damages." William L. Prosser, *Libel Per Quod*, 46 Va. L. Rev. 839, 841 (1960). Thus, private persons who wanted to obtain damages for a defamatory statement turned to the common-law courts. Because the Star Chamber heard claims of criminal libel and printed defamation, the common-law courts were left mostly with spoken private defamation.

When the Star Chamber was abolished in 1641, the common-law courts assumed jurisdiction over all forms of defamation, though the rules governing the different forms of defamation were never well-integrated. In 1670, the distinction between libel, or written defamation, and slander, which is spoken, was formalized. *See The King v. Lake, Hardes* 470 (1670).

The courts of equity, accordingly, were denied authority to hear claims for defamation. As early as 1742, it was ruled in the *St. James's Evening Post Case*, that the courts of equity had no jurisdiction over claims of libel and slander: "For whether it is a libel against the publick or private persons, the only method is to proceed at law." *Roach v. Garvan*, 26 Eng. Rep. 683, 683 (1742).

Since the common-law courts then had no power to grant injunctions, the resultant ruling meant that defamation could not be enjoined; the only permissible remedy was money damages at law.

Eventually, the unavailability of injunctive relief for defamation came to be considered an integral part of a free press. While a few cases implied that equity could, in fact, enjoin a libelous publication, these cases were quickly dismissed as aberrational throwbacks to the tyrannical censorship of the Star Chamber. For example, it was reported that the very contention that injunctions could be granted to prevent libel "excited great astonishment in the minds of all the practitioners of the courts of equity." Note to *Horne's Case* (1777), in 20 A Complete Collection of State Trials 799 (Thomas Howell ed. 1816). According to the editor of *Horne's Case*, this surprise was due to the fact that: "[T]here is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly, or by inference or analogy...."

The 1848 case of *Clark v. Freeman,* 11 Beav. 112 (1848) (Lord Langdale, Master of Rolls), announced a similar linkage of

the concept of enjoining libels to the censorial practices of the past. In rejecting a plea to enjoin the publication of defamatory statements that alleged that a physician to the Queen, "is somehow concerned in vending quack medicines," the judge stated, "I am afraid that if I were to interfere as is now asked, I should be reviving the criminal jurisdiction of the Star Chamber."

A related development in the concept of prior restraint was the growing consensus in England that judges were a potential source of oppression. For example, one of the major Eighteenth Century battles for freedom of the press in England was to give jurors, rather than judges, the power to determine whether publications were in fact defamatory. Previously, jurors had been limited to the question of whether the defendant published the material.

The most notorious case of penalizing independent-minded jurors involved the 1670 English trial of William Penn, later the founder and first Governor of Pennsylvania. Catherine Owens Peare, William Penn, A Biography 106-22 (1956). Penn had been charged with violating the Conventicle Act, which prohibited the exercise of religion "in other manner than according to the liturgy

of the Church of England." During Penn's trial, the court told the jury to ignore the defendant's plea for acquittal based on freedom of conscience. From the bale-dock, Penn cried out, "I appeal to the jury, who are my judges, and this great assembly, whether the proceedings of the court are not most arbitrary, and void of all law, in offering to give the jury their charge in the absence of the prisoners."

The jury refused to hand down a guilty verdict. The Recorder responded to the jury:

> Gentlemen, . . . you shall not be dismissed, till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire and tobacco. You shall not think thus to abuse the court. We will have a verdict by the help of God, or you shall starve for it.

All twelve members of the jury were fined and sent to Newgate prison until they paid. Eight paid rather quickly, but four refused and stayed in prison for several months. Finally, the Court of Common Pleas ruled that jurors could not be penalized for such conduct: "It is absurd, a jury should be fined by the judge for going against their evidence ...."

In 1687, William Penn, while in Pennsylvania, published a

tract entitled, *Excellent Privileges of Property and Liberty, Being the Birth-Right of the Free-Born Subjects of England,* excerpted in 1 The Founders' Constitution 431, 432 (P. Kurland & R. Lerner, eds., 1987). Penn declared that the right to a jury trial was one of the "grand pillars of English liberty, … whereby we have been, and are preserved more free and happy than any other people in the world, and (we trust) shall ever continue so:" *See generally* Alfred L. Brophy, *For the Preservation of the King's Peace and Justice': Community and English Law in Sussex County, Pennsylvania, 1682-1696*, 40 Am. J. Legal Hist. 167 (1996)(discussing how colonists in Pennsylvania worked to limit the power of judges).

More than a century later, American colonists would recite Penn's case as an example of the need for juries to protect liberty against the overreaching of the Crown's judges. One colonial writer analogized Penn's case to colonial trials for seditious libels, where juries were denied the right to determine the validity of printed complaints against the government. The obvious lesson for colonial libertarians was that juries were forever to be viewed as a "Bulwark of Saftey against Pride, Insolence and Partiality of Power." William Smith, *Letter to Printer*, N.Y Gazette; or Wkly.

Post-Boy, Mar. 19, 1770, at number 1420.

The principle behind trusting jurors rather than judges in cases involving libel was explained by Lord Camden in 1792:

> Who shall have the care of the liberty of the press--the judges or the people of England? The jury are the people of England. The judges are independent men! Be it so. But are they totally beyond the possibility of corruption from the Crown? Is it impossible to show them favour in any way whatever? The truth is, they possibly may be corrupted--juries never can! What would be the effect of giving judges the whole control of the press? Nothing would appear that could be disagreeable to the Government." (quoted in John Campbell, Lives of the Lord Chancellors and Keepers of the Great Seal of England. (5th Ed. Vol VII 1868)).

Judges were not seen as the protectors of freedom of the press. Rather, they were seen as one more governmental entity that must not be given power over the press.

C. *The General Understanding In England In 1776 Was That The Prohibition Of Prior Restraints Barred Review By Both Judges And Censors.*

At the time of the American Revolution, a consensus had developed in England that liberty of the press meant that no judicial orders could prevent what could be written for the future

and no administrative licensor or censor could preview work prior to publication. Freedom required the ability to put forth to the world what one wanted, as long as the printer was willing to accept the consequences of punishment for material considered illegal.

This background provides context for Sir William Blackstone's famous description of liberty of the press. In his *Commentaries on the Laws of England*, Blackstone described why punishment for libels was consistent with liberty of the press:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.4 W. Blackstone, Commentaries *151-*152 (1769).

Although this statement indicates the general English opposition to "previous restraints," it does not actually say what constitutes such a restraint. Blackstone merely contrasts previous restraints with punishments that are imposed after someone "publishes what is improper, mischievous, or illegal." Significantly, Blackstone's description of the remedy for a libel

omits any reference to preventive relief: "The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in its discretion shall inflict; regarding the quantity of the offence, and the quality of the offender." *Id.* at *151.

We must turn elsewhere for a fuller description of what was encompassed by the term "previous restraint." In 1775, on the dawn of the American Revolution, Jean DeLolme wrote his work, The Constitution of England (John MacGregor ed. 1853) (1775). DeLolme was a Swiss author whose description of the English government, while largely unknown to 20th Century Americans, was well-known and well-respected by Americans at the start of the Republic. John Adams referred to DeLolme's books as "the best defence of the political balance of three powers that ever was Written." Gordon S. Wood, The Creation of the American Republic 575 (1969). DeLolme's book was also cited by America's Blackstone, St. George Tucker; *See* St. George Tucker, Blackstone's Commentaries 1 app. at 298-99 (1803), and Justice Joseph Story, *See* 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1878-79, at 735-37 (1833).

DeLolme's description of liberty of the press in England stressed that such liberty meant freedom from all previous restraint, whether from the judicial branch or from licensors: "Liberty of the press consists in this: that neither courts of justice, nor any judges whatever, are authorized to take notice of writings intended for the press; but are confined to those which are actually printed." The Constitution of England at 119.

At the time of the drafting of the First Amendment, therefore, the English understanding of a free press meant, at a minimum, that neither judges nor administrators were to take notice of writings intended for the press. Battles over the permissibility of subsequent punishments persisted over the next two hundred years. But even in a repressive environment that permitted punishment for truthful criticism of the Government, one element of liberty of the press was well-understood: No governmental official--not judge, not censor, not licensor--should be involved in restricting expression before it is communicated.

II.

THE DEVELOPMENT OF THE PRIOR RESTRAINT DOCTRINE IN AMERICA

A. The Road To The First Amendment

In the American colonies, the concept of freedom of the press followed a path similar to that in England. The colonial experience taught that assaults on liberty of the press could come from any of the three branches of government: the legislative, executive, or judicial.

During the Seventeenth Century, colonial governments followed the English example and used licensing laws to restrict printed material. For example, in 1682, John Bucknew of Virginia was imprisoned for printing without governmental authority. Walter Brasch & Dana Ulloth, The Press and the State 50 (1986).

In 1723, the Massachusetts House of Representatives, angry at the criticism published by Benjamin Franklin's older brother, James Franklin, in the *The New-England Courant* barred him from further printing without governmental approval. With

James Franklin in hiding, the *Courant,* published the following anonymous open letter pleading for the use of jury proceedings, rather than summary governmental action:

> The end of Humane Law is to fix the boundaries within which Men ought to keep themselves; But if any are so hardy and presumptuous as to break through them, doubtless they deserve punishment. Now if this *Printer* had transgress'd any Law, he ought to have been presented by a Grand Jury, and a fair tryal brought on. NEW ENG. COURANT, No. 79, Jan. 28-Feb. 4, 1723.

Other colonists realized the danger posed by the requirement of prior review of newspapers. Pennsylvania's only newspaper, the *American Weekly Mercury*, ended an attack on the treatment of James Franklin with the following fictitious caustic item: "By private Letters from Boston we are informed, that Bakers there are under great Apprehension of being forbid baking any more Bread, unless they will submit to the Secretary as Supervisor General and Weigher of the Dough, before it is baked into Bread, and offered to Sale."AMERICAN WKLY. MERCURY, Feb. 26, 1723.

The trial of John Peter Zenger in 1735 highlighted the colonial distrust of judicial oversight of the press. Zenger's

newspaper, the *New York Weekly Journal*, had published criticism of government officials, and Zenger was put on trial for seditious libel . The judge in the case, Chief Justice James DeLancey, ruled that under English common law the truth was not a defense, n161 and it was for the judge, not the jury, to determine if a printed statement "make a Lybel" against the government. *See* Freedom of the Press from Zenger to Jefferson 60 (Leonard W. Levy ed., 1966). Zenger's attorney, Andrew Hamilton, conceded that Zenger had published the material, but argued both that the making of a truthful charge should not be a crime and that the jury, not the judge, should decide whether a statement is libelous. *Id.* at 44-51. He explained his distrust of judges deciding the fate of those who complain against the government:

> I think it will be agreed, That ever since the Time of the Star Chamber, where the most arbitrary and destructive Judgments and Opinions were given, that ever an *Englishman* heard of, at least in his own Country: I say, Prosecutions for Libels since the Time of that arbitrary Court . . . have generally been set on Foot at the Instance of the Crown or its Ministers; and . . . these Prosecutions were too often and too much countenanced by the Judges, who held their Places at Pleasure, (a disagreeable Tenure to any Officer, but a dangerous one in the Case of a Judge.) *Id.* at 55.

Hamilton argued that existing law not only presented a danger by giving too much power to judges, it weakened the protection of the innocent by depriving juries of the right to make the critical determination on the criminality of a publication. Finally, he pleaded directly to the jury "as Men who have baffled the Attempt of Tyranny." *Id.* at 59. Despite the judge's instructions to ignore Hamilton's argument, the jury returned a verdict of not guilty, "upon which there were three Huzzas in the Hall which was crowded with people." *Id.* at 61.

It became an article of faith for those in the colonies that the jury was an essential buffer against abuses of authority, whether by governors, parliaments, or judges. One colonial writer described the principle that there be no conviction without a jury verdict as "the glorious Security thereby given for Freedom in writing and speaking." William Smith, *Letter to Printer*, N.Y. GAZETTE; OR WKLY. POST-BOY, Mar. 19, 1770, at number 1420.

Liberty in America was seen as protection *from*, not by, colonial judges. In the Declaration of Independence, Thomas Jefferson included the symbiotic relationship between the judiciary

and the King in the list of grievances: "He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." By the time of the Revolution, Americans were well aware that their liberty, especially their liberty of the press, could be attacked by all branches of government.

One of the earliest comprehensive definitions of liberty of the press came from James Wilson at the Pennsylvania state convention ratifying the Constitution. On December 1, 1787, Wilson, who was later to serve as a Justice on the first United States Supreme Court, declared:

> The idea of the liberty of the press, is not carried so far as this [permitting libels to go unpunished] in any country--what is meant by the liberty of the press is, that *there should be no antecedent restraint upon it*; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual. With regard to attacks upon the public, the mode of proceeding is by a prosecution. . . . It must be tried where it was published, if the indictment is for publishing; and it must be tried likewise by a jury of that State. Statement at Pennsylvania ratifying convention, Pennsylvania and the Federal

Constitution: 1787-1788 at 308-09 (John Bach McMaster & Frederick D. Stone eds., Da Capo Press 1970) (1888) (emphasis added).

When Justice Joseph Story described the scope of liberty of the press protected by the First Amendment, he similarly condemned "previous restraints," whether coming from a licensor or a judge: "The liberty of the press, as understood by all England, is the right to publish *without any previous restraint, or license; so that neither the courts of justice, nor other persons, are authorized to take notice of writings intended for the press; but are confined to those which are printed.*" 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1878-79, at 735-37 (1833).

Thus, the California court in the instant case was incorrect when it asserted that the prior restraint doctrine is concerned only with ensuring an adequate determination by a judge ("[T]he special vice of a prior restraint is that it suppresses communication before there has been an adequate determination that the speech is unprotected under the First Amendment. Once there has been a final adjudication on the merits that the speech is unprotected, an injunction restraining that speech does not constitute an

impermissible prior restraint." J.A. 57) As in England, the framers of the First Amendment understood that freedom of expression requires that judges, no less than executive branch censors, may not take notice of writings intended for the press.

B. Lessons of the Alien and Sedition Act

The understanding that no government official, judicial or otherwise, may be permitted to restrict the press prior to publication was one of the few topics on which opponents and supporters of the Alien and Sedition Act, *The Sedition Act of 1798*, ch. 74, 1 Stat. 596 (1798), could agree.

Supporters of the Act, which made it a crime to write "any false, scandalous and malicious" statements against either the President or Congress, argued that the law was constitutional because it did not involve a prior restraint, but merely penalized speech after it had occurred:

> The liberty of the press consists not in a license for every man to publish what he pleases without being liable to punishment, if he should abuse this license to the injury of others, but in a permission to publish, without previous restraint, whatever he may think proper, being answerable to the public and individuals, for any abuse of this permission to their prejudice. 5 Annals Of Cong. 2987-2990,

3003-14 (1799).

John Marshall also defended the Sedition Act in his Report on the Minority on the Virginia Resolutions, as being consistent with the First Amendment because it did not impose a prior restraint. "It is known to all," he wrote, that those who publish libels or who "libel the government of the state," may "be both sued and indicted." However, he added:

> The liberty of the press is a term which has a definite and appropriate signification, completely understood. It signifies a liberty to publish, *free from previous restraint*, any thing and every thing at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community. *See* John Marshall, *Report of the Minority on the Virginia Resolutions*, J. House of Delegates (Va.) 6:93-95 (Jan. 22, 1799), *reprinted in* 5 The Founders' Constitution 136-38 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

The opponents of the Sedition Act did not disagree with the contention that prior restraints were prohibited under the First Amendment. They instead argued that protection against prior restraints was a necessary, but insufficient, condition to guarantee freedom of expression. James Madison argued that freedom of the press included not only a ban on prior restraints, but much more as

well:

> This security of the freedom of the press requires that it should be exempt *not only from previous restraint* by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws. James Madison, *The Virginia Report of 1799-1800, Touching the Alien and Sedition Laws, reprinted in* 5 The Founders' Constitution 135 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

The most significant lesson from the Sedition Act may have been that the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), requires protection for discussion of public issues from subsequent punishment. As James Madison noted, though, such protection was needed in addition to freedom from prior restraint. Both are necessary for the preservation of free expression.

C. Early Judicial Recognition That Injunctions Against Defamation Constitute An Impermissible Prior Restraints

After the end of the Sedition Act, prosecutions for seditious libel ceased to be a serious threat to Nineteenth Century freedom of expression. While common law libel actions were often

successful, state court judges throughout the country recognized the fundamental connection between the traditional rule that courts may not enjoin libels and the doctrine of prior restraints.

The first state court decision to recognize explicitly the link between injunctions on libel and prior restraints was the 1839 New York case of *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. 1839). The seller of "Brandreth's Vegetable Universal Pills," had sought to enjoin publication of a made-up "autobiography." The court dismissed the complaint, stating that it could not assume jurisdiction "without infringing upon liberty of the press." *Id.* Chancellor Walworth's opinion stressed that for a court to enjoin a publication would mark a dangerous return to the days of the Star Chamber:

> The court of star chamber in England, once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages. And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction. *Id.* at 24.

Chancellor Walworth then stated that, since the end of the Star Chamber, only one court "either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or

restrain the publication of a libel, as such, in anticipation." *Id.* at 26. He added with evident satisfaction that "the house of commons, however, considered this extraordinary exercise of power on the part of [Lord Chief Justice William] Scroggs as a proper subject of impeachment." *Id.*

In 1876, the Missouri Court of Appeals denied an insurance company's request to enjoin a libel, stating that such an injunction would violate Missouri's constitutional guarantee of free speech. *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173 (1876). The court held that even if the insolvency of the defendant meant that there was no adequate remedy at law, the constitutional guarantee forbade injunctions against speech:

> It is obvious that, if this remedy be given on the ground of the insolvency of the defendant, the freedom to speak and write, which is secured, by the Constitution of Missouri, to all its citizens, will be enjoyed by a man able to respond in damages to a civil action, and denied to one who has no property liable to an execution. *Id.* at 176.

The court concluded by explaining that a judicially imposed injunction was the equivalent of the censor's licensing power as a forbidden prior restraint on speech: "The sovereign power has forbidden *any instrumentality of the government* it has

instituted to limit or restrain this right except by the fear of the penalty, civil or criminal, which may wait on abuse." *Id.* at 180 (emphasis added).

One year after the Missouri decision, the New York Court of Common Pleas agreed that a temporary injunction against an alleged libel would violate the state's constitutional guarantee of free speech. *N.Y. Juvenile Guardian Soc'y v. Roosevelt*, 7 Daly 188 (N.Y. Ct. Common Pleas 1877). The New York Juvenile Guardian Society had sued to enjoin Teddy Roosevelt, a commissioner of the State Board of Charities, from publishing the results of an investigation which found misuse of the charity's funds. The court declared that a court of equity had no power to restrain defamatory publications and linked this rule to freedom of expression:

> The exercise of any such jurisdiction being repugnant to the provision of the Constitution, which declares (art. I, § 8) that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the *abuse* of that right; and that no law shall be passed to restain [sic] or abridge the liberty of speech or of the press. *Id.* at 191.

This principle was reaffirmed by the New York Court of

Appeals in 1902, which stated the enjoining of libels interfered with both freedom of the press and the right to a jury trial. *Marlin Fire Arms Co. v. Shields*, 64 N.E. 163 (N.Y. 1902). The court stated that:

> [Enjoining libels] would open the door for a judge sitting in equity to establish a censorship not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge by decree to lay down a chart for future guidance in so far as a plaintiff's property rights might seem to require . . . . *Id.* at 165.

Probably the most extensive discussion of the link between injunctions against defamation and prior restraints in the Nineteenth Century, came from an 1882 decision of the Louisiana Supreme Court in *State ex rel. Liversey v. Judge of Civil District Court*, 34 La. Ann. 741 (La. 1882). In that case, W. Van Benthuysen obtained an injunction against a newspaper, *The Mascot*, ordering it not to publish libelous cartoons against him. When the paper published more cartoons, its publisher was held in contempt. The Louisiana Supreme Court struck down the injunction as violative of freedom of the press.

The Louisiana Supreme Court began by stating that even though the language of its constitutional guarantee that "no law

shall be passed abridging the freedom of the press" differed in language from the U.S. Constitution, "they all signify the same thing, and convey the general idea which is crystallized in the common phrase, 'liberty of the press.'" *Id.* at 743. The court stated that an injunction for libel would conflict with the principle that "every person may freely publish what he sees fit, and any judgment of the law upon it shall be reserved till afterwards." *Id.*

The court noted the difficulty in ascertaining whether particular statements were defamatory or not, and whether or not they were privileged. Because of this lack of certainty, "there would be no safe course, except to take the opinion of the judge beforehand, or to abstain entirely from alluding to the plaintiff. What more complete censorship could be established?" *Id.* at 745. The court concluded that such a scheme would have a devastating effect on freedom of the press: "Under the operation of such a law, with a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed." *Id.*

Similarly, two Texas state courts' injunctions against defamatory statements were also found to violate that state's

constitutional protection for freedom of expression. In a 1909 case, *Mitchell v. Grand Lodge, Free & Accepted Masons of Texas*, 121 S.W. 178,179 (Tex. Civ. App. 1909), the court ruled that the state's "constitutional guaranty of liberty of speech furnishes an additional reason for the application in Texas of the general rule that an injunction will not issue to restrain the publication of a libel." In 1923, another Texas court agreed, stating that the purpose of that constitutional provision "is to preserve the liberty of speech . . . and to inhibit a court of equity from supervising one person's opinion of another or from dictating what one person may say of another...." *Strang v. Biggers*, 252 S.W. 826, 826 (Tex. Civ. App. 1923).

The Alabama constitutional guarantee of freedom of the press was similarly held to bar injunctions against defamation. In 1909, a federal court held that the Alabama state constitution forbade enjoining a libel defaming the plaintiff's credit and business standing:

> The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the court were

allowed to take the alleged slanderer or libeler by the throat, in advance. *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 F. 553, 556 (C.C.M.D. Ala. 1909).

Eight years later, another federal court in Alabama refused to enjoin a defamatory attack on the maker of an alcohol-laced medicine, stating that, "it is not within the authority of any court, or of any other governmental agency, by any sort of censorship to abridge the right belonging to every man to freely speak and publish his sentiments." *Willis v. O'Connell*, 231 F. 1004, 1010 (S.D. Ala. 1916).

Similar holdings were reached by other federal courts. In a 1900 case from Oregon, an injunction for a libel was denied: "The court cannot assume to supervise the publication of offending newspapers, or otherwise constitute itself a press censor." *Balliet v. Cassidy*, 104 F. 704, 706 (C.C.D.Or. 1900). In a 1907 case interpreting South Dakota's constitutional right to free expression, the court concluded that, "in the jurisprudence of the United States there is no remedy for the abuse of this right . . . except an action at law for damages or a criminal proceeding by indictment or

information." *Montgomery Ward & Co. v. S.D. Retail Merchs.' & Hardware Dealers' Ass'n.*, 150 F. 413, 418 (C.C.D. S.D. 1907) (citations omitted).

In 1916, the Nebraska Supreme Court joined the list of courts which explicitly linked the equitable ban on enjoining defamations with the constitutional prohibition on prior restraints. The court, in refusing to enjoin publication of a false statement that a candidate was not actually running for Governor, declared: "The power to exercise a censorship over political publications, as formerly practiced, is taken away. The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government." *Howell v. Bee Pub. Co.*, 158 N.W. 358, 359 (Neb. 1916).

These cases prove, that from the very beginning of the Republic, American courts have understood that permitting libels to be enjoined gave judges the same censorial control over

prospective speech as had been wielded by licensors of old.[2] There was wide-spread agreement that an injunction against pure speech was an impermissible prior restraint.

This consensus was reflected in this Court's landmark 1931 decision, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), which struck down, as a prior restraint, a Minnesota law which permitted the State to obtain a court order abating defamatory newspapers as a nuisance. Noting that the "object and effect" of the statute was to "suppress" future publication, the Court

[2]Some judges, such as Supreme Court Justice Bradley, sitting on circuit in *Kidd v. Horry*, 28 F. 773, 776 (E.D. Pa. 1886), tied the ban on enjoining defamations to the constitutional requirement of a jury trial. Most judges, however, just cited the rule that equity will not enjoin a libel. *See, e.g., Francis v. Flinn*, 118 U.S. 385 (1886); *Robert E. Hicks Corp. v. Nat'l Salesmen's Training Ass'n*, 19 F.2d 963 (7th Cir. 1927); *Vassar Coll. v. Loose-Wiles Biscuit Co.*, 197 F. 982 (C.C.W.D. Mo. 1912); *Edison v. Thomas A. Edison, Jr. Chem. Co.*, 128 F. 1013 (C.C.D. Del. 1904); *Computing Scale Co. v. Nat'l Computing Scale Co.*, 79 F. 962 (C.C.N.D. Ohio 1897); *Baltimore Car-Wheel Co. v. Bemis*, 29 F. 95 (C.C..D. Mass. 1886); *Donaldson v. Wright*, 7 App. D.C. 45 (1895); *Singer Mfg. Co. v. Domestic Sewing Mach. Co.*, 49 Ga. 70 (1873); *Allegretti Chocolate Cream Co. v. Rubel*, 83 Ill. App. 558 (1899); *Everett Piano Co. v. Bent*, 60 Ill. App. 372 (1895); *Raymond v. Russell*, 9 N.E. 544 (Mass. 1887); *Whitehead v. Kitson*, 119, Mass. 484 (1876); *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69 (1873); *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804 (Mo. 1892); *Mayer v. Journeymen Stone-Cutters' Ass'n*, 20 A. 492 (N.J. Ch. 1890); *Owen v. Partridge*, 82 N.Y.S. 248 (Sup. Ct. 1903); *Mauger v. Dick*, 55 How. Pr. 132 (N.Y. Sup. Ct. 1878). One such court ruled that the equity rule was not based on constitutional reasons and could be changed by statute. *See Chamber of Commerce of Minneapolis v. FTC*, 13 F.2d 673 (8th Cir. 1926). A small minority of courts actually ruled that libels could be enjoined. *See Warren Featherbone Co. v. Landauer*, 151 F. 130 (C.C.E.D. Wis. 1903); *Emack v. Kane*, 34 F. 46 (C.C.N.D. Ill. 1888); *see also Palmer v. Travers*, 20 F. 501 (C.C.S.D.N.Y. 1884) (permitting injunction for libel if defendant threatens repetition).

described the operation of the statute as putting "the publisher under an effective censorship." *Id.* at 712. The primary offending feature of the statute, according to the Court, was that upon a finding that a publisher had distributed a "malicious, scandalous and defamatory" newspaper, the "resumption of publication is punishable as a contempt of court by fine or imprisonment." *Id.* The court's injunction, "would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication." *Id.* at 712. Whether future publications would be free from punishment would depend upon whether the publisher was able "to satisfy the judge that the charges are true and are published with good motives and for justifiable ends." *Id.* at 713. This, explained the Court, "is of the essence of censorship." *Id.*

The strength of the *Near* decision is the historical accuracy and practical relevance of its holding that an injunction against expression should be viewed as an unconstitutional prior restraint. The fact that a judge's order directed against the future communication of a particular speaker would have the same debilitating effect on free communication as the censorship of the

Star Chamber's licensors had long been recognized in England and America, in numerous court decisions, and by treatise writers. *Near* was a declaration that such an infringement on free expression would not be permitted under the First Amendment.

III.

THE CONTINUING NEED FOR THE PRIOR RESTRAINT DOCTRINE

This Court properly has held that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. History teaches more than the fact that prior restraints in general, and injunctions for defamation actions in particular, violate the First Amendment. History also reveals the multiple reasons why this rule has persisted for more than two centuries. *See generally* Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 Mercer L. Rev. 1087, 1135- 1145 (2001).

A. Restraining The Censor

One of the concerns with both licensing schemes and

injunctions is the ease with which the censorial decision can be made, enabling an overly enthusiastic or biased decision-maker to go unchecked. As Professor Thomas Emerson wrote, "A government official thinks longer and harder before deciding to undertake the serious task of subsequent punishment-the expenditure of time, funds, energy, and personnel that will be necessary. Under a system of prior restraints, he can reach the result by a simple stroke of the pen." Thomas Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 657 (1955).

Prior restraints do pose a unique danger regarding both ease of issuance and governmental bias. This danger is best understood by reference to separation of powers principles. Government officials from any branch are always capable of feeling biased against a particular speaker, and any law, be it prior restraint or subsequent punishment, infringes freedom of speech when it permits officials to act on their biases. The genius behind separating powers, though, is that more than one official must feel this bias before a speaker is penalized. It is possible that all three branches of government will want to silence a particular point of

view and no system of government could prevent this occurrence. Fortunately, these moments are far rarer than the cases of the petty tyrant, the angry city council, or the prejudiced judge. Requiring more than one branch to act is not a perfect safeguard, but it is a significant one.

B. Personalization And Equal Protection

A related harm from prior restraints is the personalized nature of the governmental action. Not only does this increase the likelihood of self-censorship, but it permits encroachments on equal protection principles.

Unlike subsequent punishments, which begin with laws or regulations applicable to all potential speakers, prior restraints, whether by license or injunction, identify the individual speaker prior to the speech. The personalization inherent in any system of prior restraints gives the government the ability to violate the equal protection norm inherent in the First Amendment. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). *See generally* Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1976). Subsequent

punishments can be imposed based only on violations of laws of general applicability. Prior restraints, whether by judges imposing injunctions or licensors, by contrast, can be imposed specifically on disfavored individuals. Such procedures create the potential for unprovable suppression of unfavorable expression.

C. The Collateral Bar Rule And The Cost of Delay

One of the most pernicious features of injunctions against speech is the collateral bar rule. Unlike a law, which can be violated and still be challenged as unconstitutional, an unconstitutional injunction must be obeyed until overturned by an appellate court: "Persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980); *Walker v. City of Birmingham*, 388 U.S. 307, 317-21 (1967).

Under the collateral bar rule, an improper injunction against speech will have one of two immediate results: either it will be obeyed, and protected speech will be silenced during the

time of appeal, or it will be violated, and the speaker will be punished for uttering protected speech. This problem was summarized by Alexander Bickel with the aphorism, "where a criminal statute chills, prior restraint freezes." Alexander Bickel, The Morality of Consent 61 (1975).

D. Abstract Facts And Speculative Harms

To Professor Blasi, one of the most harmful aspects of a prior restraint is that it necessitates "adjudication in the abstract." Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 49 (1981). One aspect of the speculation problem is that the judge or licensor often must speculate over what the speaker will actually say. As the Court has noted, "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

By contrast, subsequent punishments can be imposed only after the speech is communicated. Not only does this allow a far

more accurate assessment of whether the speech was truly dangerous, it permits the public to protect the speaker who was truly effective. As has been true since colonial times, when the Government seeks to punish the most effective speakers, it runs the risk that the people will see this as punishment for eloquence, not criminality.

E. Aesthetics And Prior Restraints

Another problem with prior restraint is less in its direct impact on speech than in what might be called its aesthetic harm. The principle that a free government should not stop its citizens from expressing their opinions is a core value for Americans. To permit such restrictions, in the words of one commentator, would be to miss "the music of the First Amendment and of the doctrine against prior restraint." Steven Helle, *Prior Restraint By the Backdoor: Conditional Rights*, 39 Vill. L. Rev. 817, 874 (1994).

Professor Emerson described this problem in almost spiritual terms. He wrote that a system of prior restraint "implies a ... willingness to conform to official opinion and a sluggishness or timidity in asserting rights that bodes ill for a spirited and healthy

expression of unorthodox and unaccepted opinion." Thomas Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. at 659.

Professor Blasi similarly asserted that a philosophy permitting prior restraints was based on unacceptable premises. Prior restraints, for example, imply "that the activity of disseminating controversial communications is abnormally hazardous or disruptive, and hence represents a threat to, rather than an integral feature of, the social order." Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. at 85. Additionally, "to trust the censor more than the audience is to alter the relationship between the state and citizen that is central to the philosophy of limited government." *Id.* at 73.

F. The Framers' Intent And The Benefits Of An Easy Case

Finally, because the protection against prior restraint is not merely essential for free expression but was so understood by the framers of the Constitution, the prior restraint doctrine has the effect of producing easy cases for hard times.

First Amendment cases can be difficult for a variety of reasons. Sometimes, a new means of communication presents novel problems that have not been previously addressed. Other times, there will be disagreement over the value of specific expression or the importance of competing values threatened by the expression. Additional problems arise with new approaches either of regulating speech or of dealing with the noncommunicative aspect of expressive conduct.

But issues of prior restraints are simple. As this Court has stated, "When we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 584 n.6 (1983). We can declare with confidence that prior restraints would have deeply offended the Framers and that one of the major objectives of the First Amendment was "to prevent all such previous restraints upon publications as had been practiced by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

What this confidence provides is the rare potential for an

easy case. Speakers, lawyers, and judges can all know it is fundamentally un-American to judge speech before it is given, whether by discretionary license or injunction.

The temptation to regulate opposition speech can strike any government. In turbulent times, the desire to suppress can combine with the legitimate interest in preserving the peace to induce those with power to attempt to silence potentially offending speech. A clear, understandable prior restraint doctrine, with its impeccable historical lineage and simple directive that government officials must permit speech to be communicated, will both deter attempts to impose censorship and permit courts to halt, quickly and efficiently, any such attempt before it works its irremediable harm.

CONCLUSION

The injunction imposed against Ulysses Tory conflicts with centuries of American and English legal practice and of centuries of understanding about the essential nature of freedom of speech and of the press. The judgment of the California Court of Appeals should be reversed.

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APPENDIX

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In The Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

vs.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District, Division One

BRIEF *AMICUS CURIAE* OF MICHELANGELO DELFINO AND MARY E. DAY IN SUPPORT OF PETITIONERS ULYSSES TORY AND RUTH CRAFT

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BRIEF *AMICUS CURIAE* OF MICHELANGELO DELFINO AND MARY E. DAY

INTEREST OF *AMICI CURIAE*[1]

Amici Michelangelo Delfino and Mary E. Day are the defendants in *Varian Medical Systems, Inc. v. Delfino* (Cal. S. Ct. No. S121400), currently pending before the California Supreme Court and set for oral argument on December 7, 2004. Varian, a Fortune 500 company, sued Delfino and Day, former Varian research scientists, for defamation and other torts arising from thousands of colorful, offensive and hyperbolic statements they made over the Internet about Varian and its senior executives. Delfino's and Day's Internet statements expressed displeasure with Varian's corporate management and tactics Varian has employed in an unsuccessful effort to silence them. Delfino and Day lost at trial and were ordered to pay $775,000 in damages.

The trial court also issued a comprehensive injunction barring Delfino and Day from making future statements about Varian and its employees. The California Court of Appeal affirmed the damages award but set aside most of the injunction as an unconstitutional prior restraint. The California Supreme Court granted review, thus vacating the Court of Appeal's decision, in order to determine a narrow jurisdictional question – whether the trial court lacked jurisdiction to conduct the trial. If Delfino and Day prevail in the California Supreme Court, the case will be returned to the trial court for a new trial, where Varian might again seek injunctive relief. Accordingly, Delfino and

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Day have an interest in the outcome of the *Cochran* case as it will shape the law governing the re-trial of their case.

Delfino and Day are also interested in the outcome here because their experience as victims of a lawsuit designed to silence them has pushed them into becoming full-time free speech advocates. They came to this crusade in middle-age. They had spent their professional careers as research scientists in Northern California, and had fully expected to continue those careers. They are named inventors on twenty-five United States patents and between them have written more than 100 scientific papers. After they left Varian, they formed their own technology start-up company, MoBeta Inc. However, since Varian sued them in 1999, their lives have profoundly changed. They have set aside their life's scientific work in order to fight for their right and the right of others to criticize publically-traded corporations over the Internet and elsewhere.

Varian had expected Delfino and Day to act like countless others who have faced a similar situation and simply stopped speaking out once they saw what it would take to fight for their rights. That a major corporation would spend millions of dollars and hire three high-priced San Francisco Bay Area law firms to pursue them has served only to make Delfino and Day more determined to ensure that similar abuse is not inflicted on others. In fighting back, they depleted their entire life savings and are now indigent.

As part of their fight, Delfino and Day created their own website – http://www.geocities.com/mobeta_inc/slapp/slapp.html – as a forum to air their free speech message.

They self-published a book – *Be Careful Who You SLAPP* – which chronicled their ordeal. More than 850 libraries around the world have purchased the book. Some 78 articles and radio stories addressing the Varian litigation have been published statewide and nationally – including on National Public Radio and by the Washington Post, the Wall Street Journal, the Associated Press, USA Today, the San Jose Mercury News, Silicon Valley's Weekly Metro, Bloomberg Newswire, and the Investors Business Journal. The case has also been chronicled in law review articles and other legal publications.

Delfino and Day have learned that it has become commonplace in today's society for powerful forces to attempt to silence those who do not have such deep pockets. With the present case, this Court can help ensure that others will not suffer the same fate as Delfino, Day, Tory and Craft.

SUMMARY OF ARGUMENT

Petitioners Ulysses Tory and Ruth Craft have been barred by court order from making any statement about respondent Johnnie Cochran in any forum at any time. Petitioners' briefs will demonstrate that such an injunction constitutes an unconstitutional prior restraint. *Amici* Delfino and Day agree. This *amicus curiae* brief, however, addresses another fundamental problem with the Court of Appeal's opinion – the foundational holding that petitioners' hyperbolic statements made during their protests outside of Cochran's office constitute actionable defamation. That holding is dramatic evidence that this Court's guidance on the constitutional protection of rhetorical hyperbole is necessary to provide adequate breathing

space for social critics who do not conform to majoritarian sentiments.

The need for clarity in the protection of rhetorical hyperbole has taken on greater significance with the advent of a new medium of communication – the Internet – which has become a powerful tool in democratizing both the content of and access to information. In the past, people with little or no money had difficulty finding a broad audience. Their options were to hand out mimeographed handbills on a street corner or to speak out to a few passerbys at the local "village green." Tory and Craft pursued such a strategy in their small protests against Cochran. Now such persons can reach millions by posting commentary on the Internet, which can be readily accessed by anyone on a computer. The Internet has provided a platform for all to speak out on issues of concern to them.

The Internet has also spawned a new means of communication – the "flame war" – where posters (often anonymous) use vitriolic language and engage in ad hominem attacks. For instance, during this past presidential election campaign, one or both of the major candidates were described on the Internet as a "liar"; "war criminal"; "murderer"; "idiot"; "moron"; "douchebag"; "asshole"; and similar to "Hitler." *E.g.*, *The Politburo Diktat*: *Shrill Meter, at* http://acepilots.com/mt/archives/001343.html (last visited Nov. 8, 2004). While many deplore this lack of civility, the question for this Court is whether uncivil discourse should be chilled by defamation lawsuits or whether freedom of speech demands that unconventional and unpopular modes of expression are tolerated.

There has also been an increase in lawsuits filed by corporations and others who have become subjects of

widespread criticism as a result of the Internet's rise. Scores of lawsuits are now being filed by large corporations like Varian against individuals like Delfino and Day. The goal of these lawsuits – like the goal of Cochran's lawsuit in this case – is to silence the speaker by threatening a crushing legal battle that the individuals cannot afford. Greater clarity on the protections afforded to rhetorical hyperbole would make plain that such lawsuits are disfavored.

LEGAL ARGUMENT

THIS COURT SHOULD CLARIFY THE PROTECTION AFFORDED TO RHETORICAL HYPERBOLE AND HOLD THAT PETITIONERS' SPEECH IS PROTECTED BY THE FIRST AMENDMENT.

A. The Court of Appeal should never have reached the injunction question because petitioners' speech is protected rhetorical hyperbole.

In defamation cases, appellate courts must conduct "an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-05 (1984).

A statement is not defamatory if it "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Thus, a statement that is "no more than rhetorical hyperbole, a vigorous epithet" is constitutionally protected

expression and cannot constitute defamation even if the statement, when reviewed out of context, might otherwise be an actionable statement of fact. *E.g.*, *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20.

Notwithstanding the above principles, the California Court of Appeal in this case found that the statements Tory and Craft placed on their placards and shouted during their picketing "'crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentation of fact.'" (Joint Appendix at 59.) Thus, the Court of Appeal found falsity rather than mere rhetorical hyperbole in statements such as "Attorney Johnnie Cochran I Know What You, the Country and the city did to my case"; "Hey Johnnie How Much Did They Pay $$ You to F_ _ k Me?"; and "Johnnie is a crook, a liar and a thief. Can a lawyer go to heaven? Luke 11:46." (Joint Appendix at 11.)

The Court of Appeal was wrong. The average audience at a demonstration involving placard-wielding protesters would not take the above to be provably true statements of fact, but would recognize that, in the context of a noisy protest featuring loose and colorful language, such statements are just rhetorical hyperbole. *See, e.g.*, *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283-284 (1974) (use by union of "intemperate, abusive, or insulting language" during a labor dispute is protected speech because "'to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies'" does

not convey provably true statements of fact); *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988) (statement that Falwell had sex with his mother was a parody which "could not 'reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated'").

Applying these principles, numerous other courts have found harsh statements directed at lawyers' qualifications and competence to be nondefamatory. *See*, *e.g.*, *Partington v. Bugliosi*, 56 F.3d 1147, 1150-58 (9th Cir. 1995) ("an incompetent attorney"); *Sullivan v. Conway*, 157 F.3d 1092, 1097 (7th Cir. 1998) (plaintiff "is a very poor lawyer"); *Quilici v. Second Amendment Found.*, 769 F.2d 414, 418 (7th Cir. 1985) ("plaintiff's presentation before this court was poor, and may have 'sunk' the appeal; . . . plaintiff's presentation was 'rambling and often pointless'"); *Lewis v. Time Inc.*, 710 F.2d 549, 556 (9th Cir. 1983) (plaintiff is a "'shady practitioner'"); *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 28 (D.D.C. 1995) (plaintiff is "an incompetent, overpaid lawyer who required substantial assistance from his client"); *Ferlauto v. Hamsher*, 88 Cal. Rptr. 2d 843, 851 (Ct. App. 1999) (plaintiff's suit was "'stupid,' 'laughed at,' 'a joke,' 'spurious,' and 'frivolous'" and plaintiff was a "'Kmart Johnnie Cochran,'" a "'creepazoid attorney,'" and a "'loser wannabe lawyer'"); *James v. San Jose Mercury News, Inc.*, 20 Cal. Rptr. 2d 890, 896 (Ct. App. 1993) (plaintiff "is a member of a class of lawyers that engages in, and his conduct in this instance is an example of, sleazy, illegal, and unethical practice"); *Kirsch v. Jones*, 464 S.E.2d 4, 6 (Ga. App. 1995) (plaintiff "took over and bungled the . . . case; . . . is directly responsible for the problems of [his former clients] and should be liable for . . . the malpractice suit"); *Hopewell v.*

Vitullo, 701 N.E.2d 99, 105 (Ill. App. Ct. 1998) (plaintiff was "fired because of incompetence"); *Allen v. Ali*, 435 N.E.2d 167, 169 (Ill. App. Ct. 1982) (plaintiff was "partially incoherent"); *Guarneri v. Korea News, Inc.*, 214 A.D.2d 649, 649-50 (N.Y. App. Div. 1995) (plaintiff was "unprepared and negligent" and "lost an opportunity to appeal").)

Thus, in the present case, the Court of Appeal should never have reached the injunction issue because the challenged speech was protected rhetorical hyperbole. That the court did so demonstrates a need for clear guidance from this Court as to the contours of protected rhetorical hyperbole to ensure against uncertainty in the lower courts and insufficient protection for speech.

B. This Court should elucidate what constitutes rhetorical hyperbole in order to ensure greater breathing space for free expression.

A commentator recently noted that

> the United States Supreme Court has given lower courts little guidance on how the reasonable person standard should be applied to statements claimed by defendants to be only rhetorical hyperbole. Because of this lack of guidance, lower federal and state courts have addressed rhetorical hyperbole in a variety of ways, leaving declarants with little warning concerning what kinds of statements will be protected. Additionally, the lack of uniformity among courts has sometimes led to different treatment of similar statements made in similar contexts.

Eric Scott Fulcher, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 Ga. L. Rev. 717, 723 (2004).

Thus, for example, the Ninth Circuit does not view rhetorical hyperbole as a separate category of speech subject to protection, but as simply one factor in examining what constitutes "whether a statement implies a factual assertion." *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995). By contrast, the Eleventh Circuit recognizes rhetorical hyperbole as a separate category of protected speech which "'"reflects the reality that exaggeration and non-literal commentary have become an integral part of social discourse."'" *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002). Each court that considers the question seems to examine different factors. *See* Fulcher, *supra*, at 736-44 (collecting cases).

As a sound solution for clarifying what constitutes rhetorical hyperbole, the commentator proposes a formal three-part inquiry: (1) "Does the statement, when read literally, assert or imply objectively provable facts?"; (2) "Do the content and language of the statement negate the impression of fact?"; and (3) "Does the context in which the statement is made negate the implication of fact?" *Id.* at 755-67. The proposal sets forth additional questions as to whether the content and language negate the implication of fact: (1) "Are the Facts Implied or Asserted by Reading the Statement Literally Fantastic, Impossible, or Highly Improbable?"; (2) "Does the Statement Convey a Metaphor, Analogy, or Other Mode of Comparison?"; (3) Does the Statement Use Language Indicating That Something Connected to the Subject Is Approaching a Negative Extreme?"; (4) "Does the Statement Use Loose Language or Colloquialisms?"; and (5) "Do the Significant Words in the Statement Have Slang Meaning in Addition to Their

Customary Meaning?" *Id.* at 757-62. Finally, the proposal sets forth additional questions as to whether the context negates the implication of fact: (1) "Does the Statement Arise from or Relate to a Debate on a Controversial Issue?"; (2) "Does the Medium Through Which the Statement is Communicated Support the Application of the Rhetorical Hyperbole Defense?"; and (3) "Does the Interaction Between the Parties When the Statement Is Made Support the Application of the Rhetorical Hyperbole Defense?" *Id.* at 764-766. The commentator derives this matrix of questions from an analysis of numerous cases from many lower courts attempting to make sense of the meaning of rhetorical hyperbole.

This Court has explicitly held that rhetorical hyperbole is constitutionally protected speech, but has not yet provided guidance to lower courts for determining what constitutes rhetorical hyperbole. The above matrix gives teeth to that protection and guidance to lower courts for how to ensure it.

For better or worse, our culture is becoming increasingly more coarse. We are bombarded with public images and statements that would have shocked prior generations. *See, e.g.*, Jeffrey Rosen, *The Privatization of our Public Discourse: Essay Privacy in Public Places*, 12 Cardozo Stud. L. & Lit. 167, 176-77 (2000). But, when it comes to speech, the law values freedom over subjective notions of offensiveness, for it is "often true that one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000). The above test, clarifying the scope of protection afforded to

rhetorical hyperbole, allows greater breathing space for speech.

C. This case is part of a wave of litigation filed by powerful figures in an effort to silence unconventional social critics who lack the resources to resist such lawsuits.

One consequence of the lack of a clear definition of protected rhetorical hyperbole is a new wave of lawsuits and a chill on free expression. This case is exemplary: A powerful public figure has used his considerable resources to bring to bear the full weight of the law on two indigent and powerless persons who dared to express their opinions in a colorful and caustic manner.

This is not the only example of such a lawsuit. *Amici* are victims of a similar lawsuit filed by a large public corporation seeking to silence their Internet criticisms of the company.

Corporations are increasingly filing defamation lawsuits in retaliation for statements made about them by individuals on websites and Internet message boards and in e-mail. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 858 n.6 (2000). These lawsuits are proliferating because the protection of rhetorical hyperbole is still unclear.

> One of the most striking features of these new cases is that, unlike most libel suits, they are not even arguably about recovering money damages, for the typical John Doe has neither deep pockets nor libel insurance from which to satisfy a defamation judgment. Why, then, do plaintiffs, many of whom are wealthy corporations, choose to sue relatively impecunious John Does? The goals of

> this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him.

Id. at 858-59.

These lawsuits will continue to increase unless checked by this Court, because of the increasing popularity of a unique Internet-based form of expression: the "flame war." A flame war is an Internet message-board phenomenon in which "disagreeing speakers lash out at each other by spewing forth in vitriolic and ad hominem attacks." Bruce W. Sanford & Michael J. Lorenger, *Teaching An Old Dog New Tricks: The First Amendment In An Online World*, 28 Conn. L. Rev. 1137, 1143, n.23 (1996). Flame wars have quickly become ubiquitous in cyberspace. *See, e.g.*, April Mara Major, *Norm Origin and Development In Cyberspace: Models of Cybernorm Evolution*, 78 Wash. U. L.Q. 59, 85 (2000) ("Due to a certain amount of anonymity that cyberspace affords, flaming has become a popular form of expression for many users."); K. Weng, *Type No Evil: The Proper Latitude Of Public Educational Institutions In Restricting Expressions Of Their Students On the Internet*, 20 Hastings Comm. & Ent. L.J. 751, 810 (1998) ("This anonymity and ease of 'speaking' on the Internet have also dulled senses of decor in that it is more commonplace and even accepted to be rude and insulting. A term called 'flaming' has even sprung into being; it indicates a vicious tongue-lashing."); Thomas W. Temple, *Marching Bandwidth: Advancing Information Exchange At Stability's Expense*, 6 J. Contemp. Legal Issues 409, 421 (1995) (disputes "often escalate into absurd 'flame wars,' in which masses of messages filled with exaggerated ill will are exchanged."). The phrase has even made its way into recent dictionaries. *See, e.g.*, Merriam-Webster's Collegiate

Dictionary, 441, col. 2 (10th ed. 2003) (defining "flame" as "to send an angry, hostile, or abusive electronic message").

> Flaming is rarely defamatory.
>
> [A] flame is a common way to vent on the Internet, even among grown-ups and Harvard professors. People say things on the Internet they wouldn't say otherwise. In turn, people do not treat what they read, hear, or receive on the Internet the same way they would something told them in-person, on the phone, in a letter or that they read in a newspaper or see on television.

Weng, *supra*, at 810 (citations and internal quotation marks omitted). The point is that "in the context of a 'flame war,' it would be unreasonable for anyone to believe that the facts asserted in this war were true and not hyperbole." Michael Hadley, *The Gertz Doctrine and Internet Defamation*, 84 Va. L. Rev. 477, 498 (1998). But flaming is nevertheless becoming a rich source of litigation.

Overturning the injunction in the present case will not by itself stop this wave of litigation, since lawsuits could still be filed with the purpose of bankrupting unpopular speakers in a war of attrition over money damages that may not even be recoverable. There will still be a significant chill on expression unless this Court addresses the root of the problem – the ability to sue at all.

D. This Court should protect free expression from the danger posed by defamation lawsuits targeting unconventional speech.

Lawsuits designed to silence Internet criticism pose a dangerous threat to free speech on the Internet. "Many corporate plaintiffs that sue for Internet libel seek to send

a message to the public that they will pursue aggressively anyone who criticizes them online, and these plaintiffs seem to be using libel law to squelch not just defamatory falsehoods but legitimate criticism as well. . . ." Lidsky, *supra*, at 883. "There is some danger, therefore, that the growing popularity of the new Internet libel suits may chill more than defamatory falsehoods – it may also chill the use of the Internet as a medium for free-ranging debate and experimentation with unpopular or novel ideas." *Id.* at 890. "The chief threat posed by the new cases is that powerful corporate plaintiffs will use libel law to intimidate their critics into silence and, by doing so, will blunt the effectiveness of the Internet as a medium for empowering ordinary citizens to play a meaningful role in public discourse." *Id.* at 945.

The Internet is today's dominant public forum. It has been described as "the new 'village green' for voicing ideas and persuading one's listeners." Robert Kline, *Freedom of Speech on the Electronic Village Green: Applying the First Amendment Lessons of Cable Television to the Internet*, 6 Cornell J.L. & Pub. Pol'y 23, 58 (1996). "[T]he Internet – as 'the most participatory form of mass speech yet developed,' [citation] – is entitled to 'the highest protection from governmental intrusion." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 863 (1997), quoting *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

Some courts have held that anonymous hyperbolic statements in the context of a flame war on an Internet message board did not constitute defamation because the average audience would not take the speech to contain provably true statements of fact. *See ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 643 (Ct. App. 2001); *SPX*

Corp. v. Doe, 253 F. Supp. 2d 974, 981-82 (N.D. Ohio 2003); *Rocker Mgmt. LLC v. John Does 1 Through 20*, No. MISC 03-003 3 CRB, 2003 U.S. Dist. LEXIS 16277, at *3-8 (N.D. Cal. May 29, 2003); *Global Telemedia Intern., Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001). Other courts, however, like the California Court of Appeal in *Varian Medical Systems, Inc. v. Delfino* and the court below in this case, have failed to protect unconventional speakers who employ rhetorical hyperbole to make their points.

Until rhetorical hyperbole is better defined, speech will continue to be chilled – on the Internet, at sidewalk protests, and in a myriad of other fora.

CONCLUSION

In the past, on the basis of supposed offensiveness, public officials sought to censor the novels of James Joyce and Theodore Dreiser, the poems of Walt Whitman and Allen Ginsberg, the comedy of Lenny Bruce, and the films of Louis Malle and Bernardo Bertolucci – all of which have since become part of our cultural mainstream. In every one of those notorious cases of government censorship, the right of free speech has ultimately been vindicated, whether by the courts or with the passage of time. Far-seeing judges recognize that the law must reflect, not shape, the contours of popular culture.

Some of America's most respected jurists have observed that the right of free expression includes vulgar and offensive speech. Judge Learned Hand defended the right of public criticism "either by temperate reasoning, or by immoderate and indecent invective." *Masses Publ'g Co. v. Patten*, 244 F. 535, 539 (S.D.N.Y. 1917). Justice Oliver

Wendell Holmes warned "we should be eternally vigilant against attempts to check the expression of opinions that we loathe." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Hugo Black championed the "prized American privilege to speak one's mind, although not always with perfect good taste." *Bridges v. California*, 314 U.S. 252, 270 (1941). Justice Warren Burger cautioned that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

Four decades ago, Justice John Marshall Harlan said of the right of free speech:

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Cohen, 403 U.S. at 24-25.

This Court, standing on the shoulders of the giants who uttered these pronouncements, should vindicate them here.

For the above reasons, and for the reasons set forth in petitioners' briefing on the merits, this court should

reverse the California Court of Appeal and hold that, as a matter of law, petitioners engaged in protected speech, and that even if petitioners' speech was defamatory the injunction constitutes an unconstitutional prior restraint.

Respectfully submitted,

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In The Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

BRIEF OF *AMICI CURIAE* LOS ANGELES TIMES COMMUNICATIONS LLC, CABLE NEWS NETWORK LP, LLLP, ADVANCE PUBLICATIONS, INC., U.S. NEWS & WORLD REPORT, L.P., DAILY NEWS L.P., BELO CORP., DENVER POST CORPORATION, THE WASHINGTON POST, THE COPLEY PRESS, THE NEW YORK TIMES COMPANY, BLOOMBERG NEWS, THE HEARST CORPORATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, AND ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici, which are listed on the inside cover and described in Appendix A, are leading newspapers, magazines, broadcasters, publishers, media-related organizations, and professional associations who are actively engaged in disseminating information in the United States and abroad.[1] They share petitioners' fundamental interest in enforcing the First Amendment's strenuous prohibition against prior restraints. Because the California Court of Appeal's opinion condones an unconstitutional prior restraint on speech about a public figure, in contravention of this Court's unambiguous precedents, *Amici* respectfully submit this brief in support of petitioners.

SUMMARY OF ARGUMENT

This Court repeatedly has recognized that government censorship of the press in the form of prior restraint constitutes "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Indeed, this Court has declared that prior restraints of the press may be justified, if at all, "only in the exceptional cases," such as to prevent the dissemination of information about troop movements during wartime, or to "suppress[] information that would set in motion a nuclear holocaust." *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) ("*Pentagon Papers*") (Brennan, J., concurring). Accordingly,

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[1] Petitioners and respondent have consented to the filing of *amici curiae* briefs. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

this Court has rejected the use of prior restraints against the press, even where the publications sought to be enjoined were found to be defamatory and offensive. *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 716-18 (1931).

The California Court of Appeal has denied petitioners Ulysses Tory and Ruth Craft the most fundamental protections of the First Amendment by affirming a permanent injunction that prohibits them from making *any* future statements in *any* public forum about an admitted public figure, respondent Johnnie L. Cochran, Jr. The California court concluded that the constitutional bar on prior restraints did not apply to petitioners in large part because petitioners are "private persons," not members of the press publishing a "legitimate publication."

The decision below cannot be downplayed on the theory that it is an isolated case or that it "only" censors two ordinary citizens. It is not that simple. The injunction effectively prohibits petitioners from talking to the press about one of the Nation's most prominent attorneys – permanently. The press relies on "private persons" like petitioners to provide their knowledge and opinions of public figures, which the press disseminates to the public. But prior restraints, even those directed against private citizens, choke off crucial information to the press and public, reducing the free flow of information. Public discourse is chilled.

Without a clear ruling from this Court reaffirming the historical and constitutional prohibition against prior restraints, the well-established bulwark for free speech and a free press will be eroded, stone by stone. As petitioners noted in their Petition for Certiorari, several federal circuit courts and state courts have affirmed defamation-based prior restraints against non-media defendants.

Other public figures, relying on those incorrect prior restraint decisions, are certain to ask courts to censor future speech any time they successfully prove to a judge that past statements were defamatory. Some courts may extend these incorrect prior restraints to the press itself. The Court should not leave the door open to ever-expanding prior restraints against the press and its sources. Each time a court permits injunctive relief, prior restraint becomes less and less "extraordinary," to the detriment of the public and its democratic system. Simply reversing the decision below on narrow grounds will not adequately protect the press and its sources from the chilling effect of these prior restraints.

The purported safeguard offered by the California Court of Appeal – a trial by a judge – is no safeguard at all. The enjoined speech ultimately may be declared nondefamatory by a jury or an appellate court, the latter a distinct possibility where constitutional issues such as actual malice are subject to independent appellate review. *Bose v. Consumers Union*, 466 U.S. 485, 510, 484-85, 508-09 & n.27 (1984). Yet any reversal would not cure the harm to the public and press because the relief would come after the public interest in the topic or issue had abated. Moreover, even if a judge finds that past statements were defamatory, that does not mean that future statements are certain to be false, defamatory, injurious, or made with the requisite degree of fault. New information may become available supporting the truth of a statement. It is impossible to predict the nuance, context, and content of a statement until it is spoken or published. A phrase may assert an actual fact in one context, but may clearly be protected as opinion, hyperbole, or parody in a different context. Because it is impossible to predict whether all such future statements would be actionable, a

court injunction barring such speech is flatly unconstitutional.

Amici, therefore, respectfully request that this Court not only reaffirm the historical and constitutional prohibition against prior restraints against the press, but also declare unconstitutional prior restraints against individuals who make statements to the public or press about public figures. Such a clear rule is necessary to safeguard our "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

ARGUMENT

I. PRIOR RESTRAINTS ARE ANTITHETICAL TO THE FIRST AMENDMENT RIGHTS THAT ARE AT THE CORE OF OUR DEMOCRACY.

A. This Nation's Courts Consistently Have Vacated Injunctions Barring Future Speech By The Public And The Press Based On An Historical Mistrust Of Government Censorship.

When a branch of government, including the judiciary, blocks the publication of information, it undermines the "main purpose" of the First Amendment, which is "to prevent all such previous restraints upon publications as [have] been practiced by other governments." *Nebraska Press*, 427 U.S. at 557 (quoting *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)). This Court has "learned, and continues to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers." *Nebraska Press*, 427 U.S. at 560 (quoting *Miami Herald*

Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring)). Thus, "[r]egardless of how beneficent-sounding the purposes of controlling the press might be," this Court has "remain[ed] intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Id.* at 560-61 (quoting *Tornillo*, 418 U.S. at 259 (1974) (White, J., concurring)). It is widely agreed that "[t]here is, indeed, something peculiarly totalitarian about government systems of prior restraint." Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 15:10 (2004) ("*Freedom of Speech*").

This Nation's abhorrence of prior restraints on speech has its roots in fifteenth-century England, when the English Church first required that all religious books be approved by the diocese before publication. *See* Michael I. Meyerson, *Neglected History of the Prior Restraint Doctrine: Rediscovering The Link Between The First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 302 (2001) ("*Neglected History*"). After the Crown wrested control of the Church in the early 1530s, the Crown adopted the Church's censorship mechanism of requiring pre-publication approval of all books, pamphlets, plays, and ballads; and it completely barred all anonymous publications. *Id.* at 298. This enabled the Crown to eliminate public criticism and to restrict independent thought. Meanwhile, the English Star Chamber, named for the gold stars that adorned its chambers, was "an unhealthy hybrid of legislature and court" that acted as both judge and jury in licensing all books. *Id.* at 298, 302. It began persecuting "those 'wicked and evil disposed persons' who had published without prior approval." *Id.* at 298, 302 (quoting Star Chamber Decree of 1637, reprinted in 2 *Complete Prose Works of John Milton* 793 (1959)). One of

the Star Chamber's most notorious prosecutions was of Calvinist William Prynne, whose tract criticized the practices of the Presbyterian Church. Prynne was convicted in summary proceedings of seditious libel, or impermissible criticism of the government, and was sentenced to a fine and the removal of his ears in a public mutilation. *Id.* at 302. Although the Star Chamber was abolished in 1641, and Parliament's subsequent licensing scheme expired in 1695, the harsh censorship scheme that they symbolized served as a continual reminder of the danger arising from "the arbitrary and uncontrollable abuse of power both in England and the United States." *Id.* at 299.

A counterweight to arbitrary government censorship emerged in both England and the colonies: the jury. When Pennsylvania founder William Penn was criminally charged with illegal preaching on a London street corner in 1670, the jury refused to convict him; the jury did the same in the 1735 seditious libel trial of newspaper publisher Peter Zenger in New York. *Id.* at 305, 318. "It became an article of faith for those in the colonies that the jury was an essential buffer against abuses of authority, whether by governors, parliaments, or judges," prompting one colonial author to proclaim that the jury provides "the glorious security thereby given for Freedom in writing and speaking." *Id.* at 319.

The Zenger trial, while not creating any legal precedent, also became a lasting symbol of the dangers of prior restraints and the need for strong prohibitions against censorship. Zenger was a printer who published the *Weekly Journal*, the first politically independent newspaper in North America. He was tried for criminal libel for publishing scathing essays about New York Governor

William Cosby – essays that Zenger did not write but merely published. Smolla, *Freedom of Speech* § 1:4 (2004). Although truth was not then recognized as a permissible defense, Zenger's attorney, Alexander Hamilton, argued to the jury that it should be, and further asserted that only a jury, not a government official, could decide the criminality of the publication. *Id.* The jury took only a few minutes to acquit Zenger. *Id.*

Hamilton's arguments were echoed by English jurist William Blackstone, who was among the first English commentators to speak out against prior restraints on speech and the press. In his 1765-66 essays, Blackstone declared that "'[t]he liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and in freedom from censure for criminal matter when published.'" *Id.* at 311 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 152 (Wayne Morrison ed., 2001)). Blackstone emphasized the special role of the press in a free society, saying that a "liberty of the press is indeed essential to the nature of a free state" and that "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press." Smolla, *Freedom of Speech* § 15:2 n.3 (quoting Blackstone, *Commentaries on the Laws of England*, bk. IV, ch. XI, 151-52 (London, 1765-69) (18th ed., New York, 1836, vol. 2, 112-13).

But it was the Founders' rejection of the English licensing schemes that led to the drafting of the First Amendment, and while there was debate over the extent of the protection, "one element of liberty of the press was well-understood: no governmental official – not licensor, not censor, not judge – should be involved in restricting

expression before it is communicated." Meyerson, *Neglected History*, 34 Ind. L. Rev. at 313. Justice Joseph Story later explained in his essays that the First Amendment guaranteed "the right to publish without any previous restraint, or license," and also guaranteed the right to have the published statements "tried by a jury" if they are challenged as "unlawful, or libelous." *Id.* at 322 (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1878-79 (1833)); *see also Near*, 283 U.S. at 713 (relying on Blackstone and comparing the system of restraint in *Near* to the English licensing schemes).

During the century that followed Story's essays, a majority of state courts and federal circuit courts developed a strong consensus that prior restraints directed at journalists and non-journalists alike were impermissible, creating a body of law that eventually informed this Court's decision in *Near*. Before *Near*, this bar on prior restraints rested largely on three grounds: free speech and free press protections arising from state constitutions; the jurisdictional division between common law and chancery courts; and the defamation defendant's right to a jury trial. The courts that relied on their state constitutions also recited the Nation's historical rebellion against the Star Chamber and English licensing schemes.

California courts have been especially wary of prior restraints, both because of the history of Star Chamber proceedings in England and also because Mexican California operated under the *alcalde* judicial system derived from the Spanish Inquisition, where community officials would act as prosecutor and judge in secret criminal and civil proceedings, including claims for libel and slander. David J. Langum, *Law and Community on the Mexican California Frontier* 70-73, 103, 122-23 (1987). The secret

proceedings were widely criticized at the time because of the corrupting power inherent in granting broad powers to one judicial official, whose judgments were often tainted by personal interests. *See id.* at 33, 146-49 & n.59.

One of the first prior restraint decisions was issued more than 100 years ago by the California Supreme Court in *Dailey v. Superior Court*, 44 P. 458 (1896). Relying on the state's constitutional protection for free speech and the jurisdictional division between equity and common law courts, the court vacated a cease-and-desist order that prohibited the staging of a play, "The Crime of the Century," based on an ongoing murder trial. *Id.* at 459. The court concluded that the "attempted restraint upon the right of free speech" violated the state constitution, that "petitioner's mouth could not be closed in advance for the purpose of preventing an utterance of his sentiments," and that the play's producer could be held "responsible to the law for an abuse of that right" after he exercised his free speech rights. *Id.* at 460. As for the criminal defendant who had obtained the order, the court held that his remedy was a request for a second trial if his fair trial rights were infringed by the play. *Id.*

Similarly, the Missouri Court of Appeals relied on that state's constitutional free speech protections when it vacated an injunction barring allegedly libelous statements about a life insurance company. *Life Ass'n of America v. Boogher*, 3 Mo. App. 173, 1876 WL 9671, at *1-3 (Mo. App. Dec. 18, 1876). The fact that the defendants used the libelous statements "to levy black-mail" on the plaintiff and were not dissuaded by the threat of damages due to their insolvency was deemed to be irrelevant by the court. *Id.* at *1-2. Instead, in affirming the primacy of the right to free speech, the Missouri court declared:

> If it be said that the right to speak, write, or print, thus secured to every one, cannot be construed to mean a license to wantonly injure another, and that by the jurisdiction claimed it is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable, our answer is that we have no power to suspend that right for a moment, or for any purpose.

Id. at *2.

Alternatively, early courts relied on the jurisdictional division between chancery courts and common law courts and the right to a jury trial to vacate injunctions based on defamatory speech. For example, in *Kidd v. Horry*, 28 Fed. 773 (3d Cir. 1886), the Third Circuit refused to enjoin the publication of allegedly libelous letters that disparaged a business rival, explaining that "[c]harges of slander are peculiarly adapted to and require trial by jury in all cases at common law." *See also American Malting Co. v. Keitel*, 209 F. 351, 354 (2d Cir. 1913) ("[e]quity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may be") (quoting Pomeroy's Equity Justice, vol. 6, sec. 629 and citing numerous pre-*Near* decisions vacating defamation-based injunctions); Meyerson, *Neglected History*, 34 Ind. L. Rev. at 324-35 (citing pre-*Near* prior restraint cases); *Near*, 283 U.S. at 719 n.11 (same).

When this Court first rejected an injunction against allegedly defamatory statements in *Francis v. Flynn*, 118 U.S. 385, 389 (1885), it did so on jurisdictional, not constitutional, grounds. The case apparently did not involve the press, but rather arose from a business dispute between rival Mississippi River boat owners. This Court vacated the lower court's injunction against over 30 defendants

who allegedly caused libelous "publications in newspapers." In a terse opinion, Justice Field told the plaintiff that he had gone to the wrong court by seeking an injunction in equity: "If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel." *Id.* at 389. The Court warned that "[i]f a court of equity could interfere and use its remedy of injunction in such cases, it would draw itself into the greater part of the litigation properly belonging to courts of law." *Id.*

When this Court decided *Near* in 1931, it added to the jurisdictional objections arising from prior restraints a much stronger rationale: the First Amendment prohibition against government censorship.

B. This Court Rejected A Libel-Based Injunction As Unconstitutional In *Near v. Minnesota*, Even Though A Judge Had Determined That The Enjoined Statements Were Defamatory.

When this Court again was presented with a libel-based prior restraint in *Near v. Minnesota*, 283 U.S. at 703, the Court considered for the first time the First Amendment protections for a free press as applied to the states. The facts of *Near* are strikingly similar to the facts of the instant case. Jay M. Near was the publisher of a Minneapolis newspaper, *The Saturday Press*, who published statements about men who were serving in public office – the mayor of Minneapolis, the city's chief of police, and a local prosecutor, among others. *Id.* at 704. The defendant accused the men of a "gross neglect of duty" for failing to crack down on local gambling, bootlegging, racketeering, and an attempted assassination of a journalist. *Id.* The published statements were inflammatory and

anti-Semitic, railing that "Jewish gangsters," "Jew thugs," and "snake-faced gangster[s]" had "bought and paid for" the police chief, and had corrupted the prosecutor, the mayor, and a member of the grand jury. *Id.* at 626-27, 634 n.1.

The local prosecutor filed a civil complaint against the publisher in state court, alleging that the newspaper had violated a state public nuisance law barring "any person" or "organization" from publishing or circulating "a malicious, scandalous and defamatory newspaper, magazine or other periodical." *Id.* at 702-03. Like respondent here, the prosecutor in *Near* alleged that the defendant had published defamatory statements in the past and he sought a permanent injunction barring the newspaper from publishing any "malicious, scandalous and defamatory" statements in the future. *Id.* Like the California trial court in the instant case, the Minnesota state court judge held a hearing, examined the statements that were introduced into evidence, and made findings of fact that the published statements were "malicious, scandalous and defamatory." *Id.* at 706. The court then issued a broad injunction permanently enjoining defendant Near from publishing or circulating "any publication whatsoever which is a malicious, scandalous or defamatory newspaper." *Id.* Although defendant Near asserted that the statements were neither false nor defamatory, and that the injunction violated his First Amendment rights, these arguments were rejected by the trial court and by the Minnesota Supreme Court. *Id.* at 705.

When *Near* reached the United States Supreme Court, Chief Justice Charles Evans Hughes declared that it "raise[d] questions of grave importance transcending the local interests involved in the particular action," and

presented an "inquiry . . . as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty." *Id.* at 707-08. Drawing on the historic "struggle" in England and in this country against government censorship of the press, the Court struck down the Minnesota statute and injunction and in doing so, announced a broad First Amendment restriction against prior restraints. This Court declared that "the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints and censorship." *Id.* at 716. The Court instructed that "public officers, whose character and conduct remain open to debate and free discussion in the press, [must] find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals." *Id.* at 719. The Court described the injunction, which barred any future publication by the newspaper without prior court approval, as "the essence of censorship." *Id.* at 713.

Justice Hughes concluded that prior restraints are permitted "only in exceptional cases." *Id.* The list of possible circumstances where this might be available was short: "When a nation is at war," Justice Hughes suggested, prior restraint might be permissible to "prevent actual obstruction to [government] recruiting service [for the military draft] or the publication of the sailing dates of transports or the number and location of troops," or to prevent "incitements to acts of violence and the overthrow by force of orderly government." *Id.* But the Court observed that such instances are so rare that "for approximately one hundred and fifty years there has been almost

an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers," demonstrating "the deep-seated conviction that such restraints would violate [a] constitutional right." *Id.* at 718 & n.11 (citing state cases).

This Court's antipathy toward prior restraints expressed in *Near* was "so universally accepted" that the issue did not come before the Court again for forty years. *Nebraska Press*, 427 U.S. at 558. Although the next prior restraint case, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), did not involve the press, the Court used the occasion to reaffirm that "[a]ny prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity," and struck down an injunction that prohibited a neighborhood group from distributing its leaflets criticizing the racially-charged business practices of a local real estate broker. *Keefe*, 402 U.S. at 419 (quoting *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968)). Chief Justice Warren Burger rejected the lower court's conclusion that the leafleters were not protected by the First Amendment Free Speech Clause because their "literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement." *Id.* Instead, Justice Burger held that the petitioners "plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper." *Id.*

Also in 1971, this Court issued the landmark prior restraint decision in the *Pentagon Papers* case, in which it held that the First Amendment's free press protections prohibited a court, even during wartime, from restraining *The New York Times, The Washington Post* and other newspapers from publishing classified documents about

the Vietnam War. *Pentagon Papers*, 403 U.S. at 714 (per curiam). Moreover, the Court refused to uphold the restraint "[n]otwithstanding that the source who had provided the documents had obtained them possibly as a result of criminal conduct and notwithstanding the government's contention that publication would gravely and irreparably jeopardize national security." *In re Providence Journal*, 820 F.2d 1342, 1348 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987), citing *Pentagon Papers*, 403 U.S. at 730. In a concurring opinion, Justice Hugo Black rejected the government's assertion that "the courts should take it upon themselves to 'make' a law abridging freedom of the press in the name of equity, presidential power and national security," and concluded that "[n]o one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that [James] Madison and his collaborators intended to outlaw in this Nation for all time." *Id.* at 718-19 (Black, J., concurring). Justice Potter Stewart further noted that a prior restraint upon publication *always* will be unconstitutional, unless it can be shown that publication "will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., concurring).

Five years later, this Court reiterated that the heavy presumption against prior restraints applies even in the face of competing constitutional interests. *Nebraska Press Ass'n*, 427 U.S. at 570. In striking down a gag order barring reporters from publishing a criminal defendant's confessions before trial, the Court observed that the "thread running" through all of its previous censorship cases was that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights," because unlike post-publication

civil or criminal sanctions, which may "chill" speech, prior restraints "freeze" future speech before the audience has the opportunity to hear it. *Id.* at 559.

This Court further outlined the dangers of enjoining First Amendment activity before its exact content is known in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-17 (1980) (per curiam). In that case, the Court struck down a Texas statute that allowed courts to enjoin the exhibition of films not yet adjudged to be obscene. The government asserted that the scheme was constitutional because a judge, not a government censor, would decide the probable obscenity of future films based on an examination of *past* films. But this Court rejected the argument, emphasizing that the "heavy presumption" against prior restraints is grounded in "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Id.* at 315 & n.13 (emphasis added). In an admonition that applies equally to this case, the Court stated that "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Id.* at 315 n.13, quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (citation omitted).

C. Despite This Court's Strong Antipathy Toward Prior Restraints, The Federal Circuits And State Courts Are Divided On Whether The First Amendment Prohibits Injunctions Against Speech Based On Potentially Defamatory Statements.

Although this Court consistently has rejected prior restraints, there is a post-*Near* split among the federal

circuit courts on whether the First Amendment prohibits injunctions for future defamatory statements by individuals who are not members of the press. For example, in *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees & Rest. Employees Internat. Union*, 239 F.3d 172, 176 (2d Cir. 2001), the Second Circuit vacated as unconstitutional an injunction prohibiting a union from publishing allegedly defamatory leaflets and letters and from chanting slogans such as "No More Lies" and "Shame On You," which the trial court found to be defamatory. The Second Circuit explained that it struck down the injunction in part because the speech "may ultimately, after full appellate review, be found constitutionally protected." *Id.* at 176. *See also Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963) (vacating as unconstitutional a stipulated order barring a credit rating service from making any future reports about a businessman). The First, Third, Fourth, Seventh, and D.C. Circuits also have vacated defamation-based injunctions in post-*Near* cases on constitutional and common law grounds. *E.g.*, *Kramer v. Thompson*, 947 F.2d 666, 680 (3d Cir. 1991); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987); *United States v. Doe*, 455 F.2d 753, 760 n.4 (1st Cir. 1972); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967). *See also In re Providence Journal*, 820 F.2d at 1350 (First Circuit) (holding that a district court's injunction barring a newspaper from publishing FBI records because they would violate plaintiff's privacy was "an insufficient basis for issuing a prior restraint" and plaintiff's "sole remedy was a subsequent action for damages").

But other federal circuits have affirmed post-*Near* injunctions of supposedly defamatory speech by non-journalists. *E.g.*, *San Antonio Comm. Hospital v. Southern Calif. Dist. Council of Carpenters*, 125 F.3d 1230, 1237 (9th

Cir. 1997); *Brown v. Petrolite Corp.*, 965 F.2d 38, 50-51 (5th Cir. 1992); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206, 1208-09 (6th Cir. 1990). Petitioners have cited a similar split among the state courts. This split in authority demonstrates that a clear rule barring injunctions based on potentially defamatory statements about public figures is necessary to prevent further erosion of First Amendment protections.

D. Independently Of Its Prior Restraint Decisions, This Court Has Created Strong First Amendment Protections For Statements About Public Figures To Promote A "Robust" Public Debate.

At the same time that this Court has erected a high constitutional bar to government censorship of the media, it has recognized constitutional restrictions on defamation plaintiffs who sue the media. These post-publication protections serve the same purpose as the pre-publication protections: to promote and protect vigorous media reports and robust debate about public officials, figures, and issues. Thus, in *New York Times*, this Court held that the actual malice rule is necessary to protect the media and its sources from large defamation damage awards, even when they publish false statements about public officials. 376 U.S. 254 at 270-80. The Court recognized a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 271. Observing that "erroneous statement is inevitable in a free debate and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" *id.* at

271-72, the Court held that the First Amendment "prohibits" a public official from recovering defamation damages unless he can show the statement was made with knowing or reckless falsity. *Id.* at 279-80.

Ten years later, this Court expanded its protections for the media by extending the actual malice rule to "public figures," *i.e.*, those citizens who have assumed a position of power or influence in society. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). The Court explained that those citizens must be held to this higher standard because:

> [f]or the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)).

This Court explained that its extension of the actual malice rule to public figures was necessary to "administer[] an extremely powerful antidote to the inducement of media self-censorship of the common-law rule of strict liability for libel and slander." *Gertz*, 418 U.S. at 342. Another rationale for extending the actual malice rule was that public figures, like public officials, have a greater ability to use "self-help" by virtue of their "significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344.

In these decisions, this Court has erected substantial constitutional barriers for public officials and public figures seeking post-publication damages for false and defamatory statements. Those barriers are essential to prevent the chilling of public debate. Because the danger of chilling public debate is even greater where public figures seek permanent injunctions instead of damages, this Court should erect similar constitutional barriers to prior restraints sought by public figures.

II. THIS CASE DOES NOT PRESENT THE EXTRAORDINARY CIRCUMSTANCES NECESSARY TO JUSTIFY A PRIOR RESTRAINT AND REQUIRES A CLEAR RULE FROM THIS COURT DECLARING DEFAMATION-BASED INJUNCTIONS UNCONSTITUTIONAL.

The endorsement of a prior restraint by the California trial court and Court of Appeal on potentially defamatory speech departs from this Court's well-established precedents. The Los Angeles Superior Court rejected petitioners' contention that the injunction violated their constitutional free speech rights: "This is not a matter of speech related issues; it is simply the use of false and defamatory and privacy-invading communications to coerce or attempt to improperly coerce payment of money. . . ." (JA 43.)[2] The Superior Court generally found petitioners' statements on their picket signs to be "untruthful, misleading and malicious" – but expressly listed only the "crook" statement as false and defamatory. (JA 42, 48.) The court found that petitioners' continued picketing was "likely to damage"

[2] Citations to the Joint Appendix are styled "JA __."

respondent's "reputation" and had a "tendency" to injure his reputation. (JA 45.)

When petitioners appealed and asserted that the injunction was an unconstitutional prior restraint under *Near*, the Court of Appeal did not mention *Near* in its opinion, apparently because it concluded that that decision applied only to the press. Although the Court of Appeal acknowledged that "a prior restraint can be presumptively unconstitutional," it declared that this Court's rule against prior restraints announced in *Keefe*, 402 U.S. at 418-19, "has no application" to petitioners because "an injunction against a private person operates 'to redress alleged private wrongs,' not to suppress a legitimate publication." (JA 56.) The Court of Appeal therefore concluded that although the First Amendment protected the members of a community group who distributed leaflets in *Keefe*, that constitutional protection did not apply to petitioners' picketing activity on a public sidewalk.

The Court of Appeal's principal justification for the prior restraint was the trial court's "final adjudication on the merits" of the defamation claim and finding of "the pervasive use of libelous and slanderous statements [that] have been judicially determined" to be false and libelous under California law. (JA 57.) The Court of Appeal observed in a footnote that petitioners were likely to continue to "picket" respondent "absent restraint by the court." (JA 38-50, 58.)

There is no discussion in the decision below of this Court's requirements that a prior restraint must be justified to safeguard a "state interest of the highest order." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). Nor did the Court of Appeal acknowledge that "speculati[on]" or "factors unknown and unknowable"

never can justify such an abridgement of the First Amendment. *Nebraska Press*, 427 U.S. at 563. Indeed, the Court of Appeal did not even articulate any governmental interest to justify the prior restraint, let alone a state interest "of the highest order." According to the California court, the prior restraint against petitioners is constitutional because it "simply precludes" petitioners "from continuing [their] unlawful activity" of making false and defamatory comments about a public figure, and precludes petitioners from making future criticisms of respondent that *might* be false and defamatory. (JA 57.) This concern is speculative and hardly constitutes a state interest "of the highest order." Moreover, under the Court of Appeal's rationale, any statement could be enjoined permanently if a judge found that the statement violated *any* state statute. This rationale has been rejected by other courts in the post-publication context. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 526, 537, 539 (1989) (holding that the State of Florida's interest in preserving rape victims' privacy and encouraging rape victims to report crimes, as codified in a state statute barring the media from publishing a victim's identity, was insufficient to overcome the newspaper's First Amendment right to publish a rape victim's name that a reporter obtained from a sheriff's report inadvertently made public). Importantly, the California court's prior restraint in this case is subject to even more rigorous scrutiny than the post-publication civil judgment in *Florida Star*. *See Southeastern Promotions*, 420 U.S. at 559 (recognizing that prior restraints are a greater threat to First Amendment rights than post-publication penalties and subject to higher scrutiny).

A. This Court Should Reverse The Decision Below And Issue A Clear Prohibition Against Defamation-Based Prior Restraints Because They Weaken Constitutional Protections For The Public And The Press.

1. The First Amendment Protections Against Prior Restraints Must Protect Private Citizens Who Speak Out About Public Figures To Protect The Free Flow Of Information To The Public And The Press.

The California Court of Appeal's suggestion that the First Amendment protection against prior restraints does not apply to private citizens when a defamation plaintiff seeks "redress [for] private wrongs" defies clear authority. In fact, the sole authority to justify the injunction relied upon by the California court, *Keefe*, held to the contrary in striking down an injunction against private citizens who had been enjoined from distributing "coercive" leaflets criticizing a real estate broker. 402 U.S. at 419. In that case, this Court held that the leafleters' activity was constitutionally protected because it was "not fundamentally different from the function of a newspaper." Similarly, this Court held in *NAACP v. Claiborne*, 458 U.S. 886, 910-11 (1982), that the First Amendment protected NAACP members when they peacefully picketed outside targeted businesses, even though their intent was to encourage economic harm to businesses during a boycott. The California Court of Appeal's decision impermissibly conflicts with this clear precedent.

Moreover, although the harm to petitioners should not be minimized, prior restraints harm more than just those who are silenced. By barring petitioners from speaking about respondent in a "public forum," the California court

has effectively prohibited petitioners from speaking to the *Los Angeles Times* and other media organizations about their dispute with respondent.[3] Reporters are unable to ask petitioners about their claim that respondent did not adequately represent their interests in a civil rights lawsuit filed against the Los Angeles Police Department for an officer-involved shooting. (JA 38, 41-42, 52.) Thus, the court has restricted the flow of information to the public and press about this admitted public figure and "nationally known attorney." *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1116 (C.D. Cal. 1998), *aff'd*, 210 F.3d 1036, 1038 (per curiam).[4] Respondent has garnered international fame from his role as lead defense counsel in O.J. Simpson's "highly controversial" murder trial in Los Angeles in 1995 that "implicated issues of national interest and concern," including "the criminal justice system itself." 58 F. Supp. at 1115-16. Respondent has continued to represent high-profile clients and has published an autobiography, *A Lawyer's Life*. *See* http://www.cochranfirm.com/media-cochranbook.html (last visited November 4, 2004). Yet respondent was unable to tolerate criticism from two former clients, and enlisted the courts to silence them – permanently – in the public fora where they are most likely to be heard by other clients, quoted by reporters, and noticed by the public.

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[3] Numerous California courts have held that press publications and broadcasts are public fora. *E.g.*, *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 474 (2000) (newsletter is a public forum); *Seelig v. Infinity Broadcasting*, 97 Cal. App. 4th 798, 808 (2002) (radio show is public forum).

[4] Respondent's unrelated defamation lawsuit for damages against the *New York Post* was dismissed on the ground that the challenged statement was "opinion" and therefore "absolutely protected by the First Amendment." 58 F. Supp. 2d at 1126.

As this Court reminded in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991), "[t]he press ... guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." (Citation omitted.) The Court also has observed that "[t]he judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Id.* (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978)). By enjoining petitioners from speaking about respondent, the court below has reduced the flow of information about one of the most prominent officers of the court.

This Court has acknowledged that newsgathering "qualif[ies] for First Amendment protection," and that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681, 692-94 (1972). This protection derives from the recognition that reporters depend on access to a wide variety of sources, including private individuals, to provide important information about the operation of government, the actions of public figures, and important public issues that touch our lives. But the media's ability to gather and report news about public figures will be drastically reduced if courts are permitted to enjoin speech about public figures.

Other plaintiffs are likely to follow respondent's path, relying on permissive authority in other jurisdictions. With each new court approval of a prior restraint, courts will be less reluctant to impose this remedy against individuals and the press. Prior restraints will become more acceptable. This gradual erosion of this Court's rule against prior restraints threatens to undermine this

Nation's commitment to a vigorous debate on matters of public concern. As this Court observed, "[t]he damage can be particularly great when the prior restraint falls upon the communication of news and commentary about current events." *Nebraska Press Ass'n*, 427 U.S. at 559.

2. A Trial By A Judge That Determines That Past Statements Are Defamatory Cannot Be Used To Justify Government Censorship Of Future Statements.

The California Court of Appeal asserted that a permanent injunction enjoining future speech by a defendant "does not constitute an impermissible prior restraint" so long as the trial court holds "a full trial on the merits and finds that the speech at issue is not protected." (JA 57.) But this purported procedural safeguard fails for several reasons.

First, the California court ignores the "traditional rule . . . that equity will not enjoin a libel." *Metropolitan Opera Ass'n*, 239 F.3d at 177. "This rule rests in large part on the principle that injunctions are limited to rights that are without an adequate remedy at law, and because ordinarily libels may be remedied by damages, equity will not enjoin a libel absent extraordinary circumstances." *Id.* As this Court explained over 100 years ago, in vacating an order enjoining allegedly defamatory statements published in the press about a Mississippi River boat owner, "[i]f the publications in the newspaper are false and injurious, [the plaintiff] can prosecute the publishers for libel." *Francis*, 118 U.S. at 389. Defamation plaintiffs will always have an adequate remedy at law for damages; defendants must be accorded their right to a jury trial.

In addition to this jurisdictional barrier to prior restraints, defamation defendants are entitled to full appellate review of any asserted constitutional defenses in the wake of *New York Times* and its progeny. As this Court announced in that case, appellate courts must independently review the evidence in defamation cases "to determine whether it could constitutionally support a judgment . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285 & n.26. This Court conducted an independent review of the record of the jury trial, and concluded that the $500,000 defamation judgment could not stand because the public officials lacked clear and convincing evidence of actual malice and could not establish that the statements were "of and concerning" them. *Id.* at 285-88. The *New York Times* case illustrates the dangers of prior restraint. What if the plaintiffs in that case had asked the Alabama trial court to issue a permanent injunction against the clergymen and *The New York Times*, either in a preliminary injunction hearing or *after* the jury found that the published statements were defamatory? Under the rationale of the decision below, the trial court would have been able to enjoin the clergymen, who were not journalists, as well as the newspaper, from making any public statements about the local police officials based on the finding of past defamatory statements, during the peak of the civil rights movement in the South. The fact that this Court ultimately declared the statements to be constitutionally protected demonstrates the dangers of censoring speech based on an erroneous finding by a judge or jury.

But even with full appellate review, prior restraints based on potential defamatory statements are unconstitutional because it is impossible to determine in advance

whether a statement will be false, defamatory, injurious, or made with the requisite degree of fault. Circumstances change, such that a statement that may be false at one point in time may later be an accurate reflection of new facts. This Court has recognized the dangers of enjoining future speech because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Vance*, 445 U.S. at 315 n.13. Recognizing the fallacy of prophetically and prospectively adjudicating defamation claims, a California Court of Appeal decision recently concluded that a prior restraint based on potentially defamatory speech is unconstitutional, even where a court or jury had determined that *past* statements were actionable. *Balboa Island Village Inn, Inc. v. Lemen*, 121 Cal. App. 4th 583, 603 (2004). As the court explained, "[w]hile at the time of trial, those statements were false, whether any of those statements would be false and defamatory if published in the future depends on future events as well as the context in which any statement is made." *Id.* Thus, whether a statement is actionable "cannot be assessed until the statement is made." *Id. See also Wilson v. Superior Court*, 13 Cal. 3d 652, 661-62 (1975) (striking down injunction requiring campaign flyers to present "fair and balanced" account of rival's background because "petitioner was placed in the untenable position of speculating on whether his attempts to comply with the court orders were satisfactory or whether additional versions of the Newsletter would also be repressed").

For the most part, this Court's consistent bar against prior restraints has discouraged other courts from trying to censor the media and has helped to make prior restraints exceedingly rare in this Nation. But continued vigilance is

essential. If the California Court of Appeal's decision and similar decisions in other jurisdictions are allowed to stand, those decisions inevitably will invite other courts to issue prior restraints against other individuals. Although the decision below and the other defamation-based prior restraint decisions applied to non-media defendants, courts may use those decisions to justify injunctions against the media and their sources. Indeed, the California Court of Appeal in this case relied primarily on the California Supreme Court's prior restraint decision in *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121, 146-47 (1999), even though *Aguilar* did not deal with defamation; it enjoined speech in a private workplace because a jury had found that the defendant had violated a state employment discrimination statute by making racial slurs. (JA 57.) This bootstrapping illustrates the dangers of allowing courts to erode this Nation's strong historical and constitutional restriction of prior restraints.

This Court has recognized that First Amendment protections for the press are necessary for a vibrant democracy, which requires an "unfettered interchange of ideas for the bringing about of political and social change." *New York Times*, 376 U.S. at 269. Our Nation has a "profound national commitment to the principle that debate on public issues should be uninhibited," and a common understanding that "erroneous statement is inevitable in a free debate and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72. Without a firm protection against prior restraints for potentially defamatory statements about public figures, the First Amendment's requirement that the government "shall make no law . . .

abridging the freedom of speech, or of the press" would be severely eroded.

CONCLUSION

This case provides the Court with the opportunity to reaffirm the strong prohibition against prior restraints that it articulated in *Near, Pentagon Papers,* and *Vance*. The First Amendment requires a categorical bar against prior restraints – against the media or against individuals – based on potentially defamatory statements about public figures. Anything less would undermine this Nation's commitment to "robust" public debate. *New York Times*, 376 U.S. at 269-70.

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APPENDIX A

Advance Publications, Inc. is a privately held communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States. These newspapers include the *Birmingham News*, *Mobile Register*, *Huntsville Times*, and *Atlanta Business Chronicle*. Advance Publications, Inc. also owns The Condé Nast Publications, which publishes eighteen magazines with nationwide circulation, including *Vanity Fair* and *Vogue* magazines, and also owns Fairchild Publications, Inc., Parade Publications, and The Golf Digest Companies. In addition, Advance Publications owns many Internet sites that are related to its print publications, as well as interests in cable systems serving over two million subscribers.

The Association of American Publishers, Inc. (AAP) is the national association in the United States of publishers of general books, textbooks and educational materials. AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

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subsidiary, Belo Interactive, Inc., includes over 30 internet websites, several interactive alliances and a broad range of internet-based products.

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Cable News Network LP, LLLP, ("CNN") is a subsidiary of Turner Broadcasting System, Inc, a Time Warner company. CNN is the world's largest news organization with over a dozen television and radio news networks and websites available worldwide, as well as several news programming services, which are provided to affiliates domestically and worldwide. CNN employs more than 3,000 news professionals, who gather news throughout the world.

The California Newspaper Publishers Association is a nonprofit trade association representing about 500 daily

and weekly newspapers in California. CNPA has stood in defense of the rights guaranteed by the First Amendment for well over a century.

The Copley Press, Inc. publishes nine daily newspapers, including *The San Diego Union-Tribune*, that regularly cover national and international news and operates an international news service.

Denver Post Corporation, dba The Denver Post, is a Delaware corporation that publishes *The Denver Post*, a newspaper of general circulation published daily and serving the people of Colorado and the Rocky Mountain region. The Denver Post also operates and maintains the website www.denverpost.com, providing up-to-the-minute local, statewide and national news, as well as features and other web-exclusive material.

Daily News, L.P. publishes the New York *Daily News*, which is one of the largest newspapers in the United States. The paper has a daily circulation of more than 700,000, and a Sunday circulation of more than 800,000, primarily in the New York City metropolitan area.

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The New York Times Company publishes *The New York Times,* a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes sixteen other newspapers, including *The Boston Globe*, and owns and operates eight television stations and two radio stations.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

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The Washington Post publishes *The Washington Post*, a leading newspaper with a nationwide daily circulation of over 759,000 and a Sunday circulation of over 1.03 million.

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IN THE

SUPREME COURT OF THE UNITED STATES

ULYSSES TORY, ET. AL.

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.

Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE

BRIEF OF AMICUS CURIAE THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

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November 12, 2004

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press against threats in many forms. The Center has participated actively in the litigation of First Amendment issues, and has filed *amicus curiae* briefs in the United States Supreme Court, the Federal Courts of Appeal, and in numerous state courts. Consent to file in this Court was granted by all the parties.

NATURE OF THE CASE AND STATEMENT OF FACTS

Nearly 20 years ago, noted Los Angeles lawyer Johnnie Cochran, Jr. represented Ulysses Tory in a civil rights suit. At some point in that litigation, Cochran withdrew as Tory's lawyer. In the late 1990s, Tory and others, including his wife, began picketing Cochran's office and the Los Angeles Superior Court building carrying signs bearing various statements. Tory did not personally carry all the signs, and several of the signs made no mention of Cochran's name. The placards that did mention Cochran by name criticized his handling of the case, questioned his ability as an attorney, and demanded the return of money Tory felt Cochran owed him. Cochran successfully sued Tory for libel and invasion of privacy but, instead of awarding him damages, a judge issued an injunction ordering Tory and "all persons acting in

concert with him" to never again display a sign or even speak about Cochran — favorably or otherwise — in a public place.

The California Court of Appeal upheld the injunction, emphasizing that it was aimed at "redressing private wrongs" rather than suppressing speech about public matters of concern. It is that decision that is now before this Court.

SUMMARY OF ARGUMENT

The judgment of the court below sustains a classic prior restraint on speech that conveys views on issues of public concern, and, for that reason, is highly suspect under this Court's clear and consistent First Amendment rulings. Although not all expression is constitutionally exempt from injunctive relief, see e.g., *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), the conditions under which this Court has occasionally permitted such relief differ sharply from the present case in two vital respects.

First, none of the exceptional interests that have been held to warrant injunctive relief are present here. There is, for example, no urgent need to protect ingress or egress in the exercise of a constitutionally protected right, cf. *Madsen*, 512 U.S. 767-68, or to

maintain an orderly electoral process near polling sites, cf. *Burson v. Freeman*, 504 U.S. 191, 208-09 (1992), or to preserve privacy in the environs of a residence, cf. *Frisby v. Schultz*, 487 U.S.474, 484 (1988).

Second, the injunction that is challenged here reflects few, if any, of the strictures observed by courts that have permissibly enjoined speech. This injunction is not, for example, narrowly tailored to reach only clearly unprotected speech, nor is it strictly limited in time, nor does it target only those persons who have engaged directly in the activity or expression that warrants judicial intervention. These flaws, among other shortcomings of this decree, do not meet this Court's high standards for injunctive relief against speech. Indeed, the central premise of the judgment below that courts may enjoin defamatory statements—is inapposite under the circumstances. In this case, most, if not all, of the enjoined statements were not actionably defamatory, and the record lacks any proof by the acknowledged public-figure plaintiff that the statements were made with actual malice, thus rendering the plaintiff constitutionally ineligible for even the lesser remedy of

money damages. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Finally, *amicus* urges that the court below failed independently to review the record with anything approaching the standard of care required by this Court's ruling in *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). Although the court of appeal "assum[ed] that this is a case in which we must review the evidence de novo," no such review was undertaken; instead, the court seems simply to have relied uncritically on the superior court's *ipse dixit* that "[u]ncontroverted evidence establishes" the proof of actual malice that is essential to penalizing or restraining speech about a public figure. *Cochran v. Tory*, 2003 WL 22451378 at *4 (Cal. App. 2d Oct. 29, 2003).

I. INJUNCTIVE RELIEF WAS UNWARRANTED UNDER THE CIRCUMSTANCES OF THIS CASE, AND CONTRAVENES THIS COURT'S FREE SPEECH JURISPRUDENCE.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional

validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *see also Near v. Minnesota*, 283 U.S. 697, 716 (1931). This Court has permitted the use of injunctions to prohibit expression only under the most unusual and exigent conditions. Where such relief ha. been allowed against expressive activity, it has been justified by compelling government interests. Furthermore, the scope, extent, and duration of injunctive relief that infringes upon speech have been scrupulously limited. The injunction in the present case is neither justified by a significant government interest nor is it tailored with sufficient precision to survive First Amendment scrutiny.

A. The injunction challenged here fails to serve a compelling interest.

A canvass of the few situations in which this Court has condoned injunctive relief against expression reveals a close nexus between such relief and vital public interests that could not be served through less drastic means.

In very special situations, for example, this Court has recognized an inescapable need to "reconcile [its] commitment to free speech with [its] commitment to other constitutional rights," *Burson*, 504 U.S. at 198. The countervailing interest in *Burson* was the right to vote, the untrammeled exercise of which might occasionally justify limiting campaign speech around polling sites on election day. Similarly, cases like *Madsen*, 512 U.S. at 753, recognize that limited injunctive relief may occasionally be justified to ensure the free exercise of the constitutionally protected right to make reproductive choices. This Court expressly reaffirmed that rationale in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1996), when it sustained a limited injunction based on the compelling presence of a governmental interest in "protecting a woman's freedom to seek pregnancy-related services." *Id.* at 376.

Likewise, when free-speech rights collided with the government's substantial interest in ensuring equal opportunity in employment, this Court saw fit to sustain an injunction against sex-

designated "help wanted" advertisements. *See Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

In each of these cases, the impelling force behind creating an exception to this Court's abhorrence for prior restraint was a clear recognition that protecting a constitutional or statutory interest of a very high order warranted such intervention. The Court should take this opportunity to correct any misapprehension on the part of lower courts about the reach of these injunction-sustaining precedents to defamation actions. *See, e.g., Retail Credit Co. v. Russell*, 234 Ga. 765, 778-79, 218 S.E.2d 54, 62-63 (Ga. 1975) (citing *Pittsburgh Press* to support a holding that an injunction preventing libelous statements by a credit reporting agency was not an unconstitutional prior restraint on expression). In so doing, the Court would limit the reach of injunctions on speech to circumstances in which the countervailing government interest is more substantial than the concern for shielding a public figure from potential reputational injury.

This limiting principle is consistent with the other exceptional instances in which this Court has justified injunctive relief against

expressive activity. For example, this Court has on several occasions recognized that protecting the privacy of health professionals against threatening and intrusive activities near their homes may warrant limited injunctive relief. *See Madsen*, 512 U.S. at 765, *cf. Frisby*, 487 U.S. at 484. Such decrees have, however, been sustained only to the extent necessary to ensure the recognized interests.

Interests of national security also occasionally warrant limited injunctive relief. In *Near*, 283 U.S. at 716, this Court recognized that "[n]o one would question but that government might prevent actual obstruction to its recruiting service or publication of the sailing dates of transports and location of troops"—the latter being the very situation that Justice Brennan envisioned in his concurring opinion in *New York Times Co. v. United States*, 403 U.S. at 726, as the one possible basis for a prior restraint against a publication. This interest has been recognized as affording possible justification for prohibitions on picketing on or near a military base, as in *Greer v. Spock*, 424 U.S. 828, 838 (1976), and on demonstrating in the

immediate vicinity of a foreign embassy or United Nations mission, *Boos v. Barry*, 485 U.S. 312 (1988).

What is striking about the present case is the complete absence of any comparably urgent basis for the broad injunctive relief that has been granted and sustained by the California courts. Surely there is no issue of national security or international comity here. Whatever might have been the situation had similar picketing occurred in the immediate environs of Respondent Cochran's home, the inquiry remains purely speculative here because the target activity occurred entirely in the vicinity of a commercial office and not in a residential area. Similarly irrelevant is conjecture about picketing or demonstration that might have physically blocked ingress to or egress from that office building, or might have deterred prospective clients and others from entering or leaving the building. Indeed, the circumstances of this case offer no parallel whatever to any of the situations in which this Court has found warrant for enjoining expressive activity to protect a basic individual interest or to serve a vital public interest. At most, the premise for injunctive relief here is that the statements Petitioner

has made about Respondent are unflattering, embarrassing, and possibly harmful to reputation. No amount of such statements would justify the drastic remedy the California courts have imposed.

B. <u>The challenged injunction fails to meet First Amendment standards in its scope, duration, and precision.</u>

Even if exceptional circumstances might have warranted the limited use of injunctive relief, the actual decree issued by the superior court far exceeds constitutionally imposed standards in several crucial respects. For one, its duration is unlimited. This Court has consistently distinguished between brief or temporary restraints and those which are either permanent by their terms, *Alexander v. United States*, 509 U.S. 544, 550 (1993), or which are effectively permanent despite superficially limiting language, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). Where the scope of an injunction is more than temporary, and extends beyond a brief time period, this Court has been especially skeptical of such intervention, see, e.g., *Alexander*, 509

U.S. at 550. The injunction challenged here leaves no ambiguity about its duration, for it "permanently enjoins" the target expressive activity.

Moreover, the injunction in this case falls far short of the narrow tailoring which this Court's rulings consistently demand. Even if the terms of this decree reached only actionably defamatory statements about Respondent and his professional status, it would still be problematic on several grounds. The actual order in this case is, however, unimaginably broader. Its coverage is not limited to Petitioner and other persons who have actually engaged in the offensive activity, but reaches a potentially limitless array of unnamed "agents, representatives, and all persons acting in concert . . ." Nor is the scope of this order confined to statements that are actually or potentially defamatory – or, for that matter, even to comments unfavorable toward the Respondent. Thus, if Petitioner wished to display a laudatory statement about Respondent, it too would be indiscriminately banned without proof that any legally cognizable interest was involved.

C. <u>The challenged injunction bans speech, much of which is protected by the First Amendment</u>.

The decree entered by the California courts is even more seriously flawed for a wholly different reason. Any injunction issued against actionably defamatory speech would be highly suspect, if only because the victim of such calumny has adequate legal recourse through money damages. Even the possible validity of such an order is, however, of no value to the present case. Not only is the challenged injunction not limited by its terms to defamatory statements, but, in fact, many of the statements to which it has been applied would fail even in a civil libel suit to meet the standard of actionable defamation about a public figure, and thus would not warrant even money damages, much less injunctive relief. Two distinct factors support that conclusion.

For one, many of the statements targeted by this injunction simply lack the essentially factual element that makes them potentially actionable as defamation. This Court has consistently recognized that many types of unwelcome—even offensive and opprobrious—statements about another person are not defamatory.

The examples are many and varied: referring to the negotiating posture of an aggressive real estate agent as "blackmail," *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970), accusing a non-striking worker as a "traitor" to the union, *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974), or impugning the morality of a prominent evangelist through a tasteless parody, *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). In these and myriad other situations, courts have recognized that much offensive speech is not necessarily defamation, even if the speech may harm a person's reputation.

So it is with many, indeed most, of the statements that Petitioner has displayed in this case. The words are disrespectful and offensive, beyond doubt, and they may even threaten Respondent's reputation in some quarters. But, almost without exception, these statements constitute the type of "rhetorical hyperbole" this Court has cautioned that a contentious society must tolerate. *Greenbelt Coop. Pub. Ass'n*, 396 U.S. at 13-14. Thus, given the breadth of the actual decree is this case, it would be inappropriate to speculate on the validity of an injunction narrowly

confined to the few of Petitioner's statements that do contain the essentially factual quality that most of them lack.

There is a second and equally fatal flaw. Respondent is, beyond any possible doubt, a prominent public figure. As such, he would be required to establish "actual malice" in order to recover damages in a civil suit for any allegedly defamatory statement. *See New York Times*, 376 U.S. at 279-80. Injunctive relief is surely no more readily available than a monetary judgement without proof of deliberate falsehood or reckless disregard of truth or falsity. Yet the record in the superior court contains none of the requisite proof on this vital issue. Indeed, with respect to most of the "non-factual" statements, such proof would be analytically unavailable, and its absence is thus hardly surprising. Even for the few statements that might be factual enough to invite a libel suit, no findings were made to support the essential demonstration of malice. Such a finding would have been theoretically possible, though elusive, because no indicia of actual malice appear in the record.

II. THE CALIFORNIA COURT OF APPEAL FAILED TO CONDUCT THE INDEPENDENT REVIEW OF THE FACTUAL RECORD THAT THIS COURT REQUIRES IN CASES INVOLVING A POTENTIAL INFRINGMENT OF THE RIGHT OF FREE SPEECH.

The principle that a permanent injunction of speech must be narrowly tailored follows logically from this Court's mandate that, in cases involving restrictions on speech, an appellate court must review the facts of the case de novo. *Bose*, 466 U.S. at 505. Such independent review is necessary "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," and an appellate court must decide "whether a given course of conduct falls on the near or the far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995) (citing *Bose*, 466 U.S. at 503); *see also In re George T.*, 33 Cal. 4th 620, 632, 93 P.3d 1007, 1013 (Cal. 2004). In cases where a trial court has found speech to be unprotected, this Court "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category

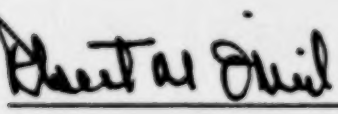
within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose*, 466 U.S. at 50[illegible] (emphasis added). It would be ironic indeed if this Court required the precision that independent review of the facts entails in separating protected from unprotected speech but did not demand the same precision in formulating the remedy of an injunction against the unprotected speech. Moreover, in the instant case, it does not appear that the California Court of Appeal conducted the required independent review of the facts. Although the lower court stated that it "assum[es] that this is a case in which we must review the evidence de novo to determine whether it supports the trial court's finding of actual malice," *Cochran v. Tory*, 2003 WL 22451378 at *4 (Cal. App. 2d Oct. 29, 2003), the appellate court failed to identify the facts that establish such a state of mind. Rather, the lower court merely states that "[u]ncontroverted evidence establishes . . . that Tory knew his statements were false." *Id.* Nowhere in the opinion did the court identify this "uncontroverted evidence" or explain how it establishes proof of Tory's knowledge concerning the veracity of his speech—a vital element in proving

defamation against a public figure. *See New York Times*, 376 U.S. at 279-80.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to reverse the judgment of the California Court of Appeal.

Respectfully submitted,



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